Supreme Court, U. S.
FILED
JAN 4 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

v.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

### The Opinions Below

The opinion of the Court of Appeals for the Second Circuit,[1] not yet officially reported, appears in the Appendix

[1] Meskill, Circuit Judge, Bryan and Stewart, District Judges of the Southern District of New York.

hereto (1a-18a) and is unofficially reported at 96 L.R.R.M. 2921. It reverses the decision of the United States District Court for the Southern District of New York (Owen, J.) (23a-54a), reported at 434 F. Supp. 810, which held the payment of unemployment compensation to strikers under the New York Labor Law to be an unconstitutional infringement upon federal labor policy.

## Jurisdiction

This petition for certiorari has been filed within 90 days of the entry of judgment of the Court of Appeals on November 9, 1977. This Court's jurisdiction to review the judgment below is invoked under 62 Stat. 928, 28 U.S.C. §1254 (1).

## Questions Presented

1. Whether Congress, in fashioning a comprehensive national labor policy mandating government neutrality in labor disputes and leaving the area of collective bargaining to the free play of economic forces, intended that the several states be permitted to grant unemployment compensation to strikers at the expense of the struck employer.[2]

2. Whether the federal policy of government neutrality in collective bargaining must give way to state enactments granting employer-financed unemployment compensation to strikers, regardless of the adverse impact of such benefits on free collective bargaining.

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[2] The decision below is in express disagreement and in conflict with a decision of the Court of Appeals for the First Circuit on this issue, as well as with decisions of several district courts. See pp. 10-14, *infra*.



## Constitutional Provision Involved

Article VI, Clause 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

## Statutes Involved

Section 592.1 of the New York Labor Law (McKinney 1977) provides for the payment of unemployment compensation to strikers after a "Suspension of accumulation of benefit rights":

> 1. Industrial controversy. The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning with the day after such strike, lockout, or other industrial controversy was terminated.

The pertinent federal labor policy is embodied in the National Labor Relations Act, *as amended* (hereinafter

"NLRA"), 29 U.S.C. §§141 *et seq.*, and is described at pages 21-22 and note 16, *infra*.

## Statement of the Case

### A. *The Proceedings.*

This action was commenced on October 24, 1973.[3] The complaint sought, along with other relief, a judgment declaring the New York statute providing unemployment compensation for strikers unconstitutional. Respondents moved for a summary judgment dismissing the complaint and the District Court (Owen, J.) denied the motion in all respects (Memorandum Opinion #42,125, filed March 31, 1975, appearing at 55a-56a).

The issue of liability was first and separately tried, with the understanding that the question of the amount of monetary damages would subsequently be heard if the statute in question were found to be unconstitutional. The trial consumed nine days, during the course of which the District Court heard twelve witnesses and received approximately 450 exhibits. On May 23, 1977, the District Court issued its Opinion and Order declaring the New York statute unconstitutional to the extent it provides unemployment compensation to strikers. Thereafter, on June 24, 1977, the District Court issued its Declaratory Judgment and Order for Permanent Injunction (19a-22a), subsequently entered on June 27, 1977.

[3] The District Court had jurisdiction of this case under 28 U.S.C. §§1331, 1337 and 1343. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars in respect to each of the plaintiffs-petitioners.



On November 9, 1977, after an expedited appeal, the Court of Appeals for the Second Circuit reversed the decision below and remanded with instructions to dismiss the complaint.

### B. *The Facts.*

The facts in this case, as found by the District Court (24a-28a), were implicitly accepted by the Court of Appeals (5a-6a). In the words of the Court of Appeals, they proved a "conflict between New York's statute and the broad federal policy of free collective bargaining" (17a). And, as stated by the District Court, "to the extent it [the New York statute] provides for the payment of unemployment compensation to strikers [it] is state intervention on behalf of the strikers, causes an employer to finance its own strikers, [and] is in conflict with federal labor policy" (54a).

Notwithstanding this proven conflict, the Court of Appeals reversed the finding below of unconstitutionality on the ground that Congress, in effect, had granted the several states *carte blanche* to provide unemployment compensation to strikers regardless of the impact thereof on the federal labor policy of government neutrality in labor disputes and free collective bargaining.

New York's Unemployment Insurance Law grants striking employees unemployment compensation after a waiting period of eight weeks. N.Y. Labor Law §§590.9, 592.1 (McKinney 1977).[4] No showing of need is required to entitle

[4] Rhode Island has a similar law requiring a waiting period of seven weeks. R.I. Gen. Laws §28-44-16. Other states have different laws under which unemployment compensation is paid to strikers. There are at least 15 other lawsuits presently pending in the federal courts challenging laws of this kind on federal labor law preemption grounds. These cases are cited at page 15, *infra*.

a striker to weekly benefits which, under present law, amount to a maximum of $115.00 and, as of September 1978, will be increased to $125.00.[5] Since New York's unemployment compensation system is financed solely by employer contributions, the cost of making these payments is borne by the struck employer (6a).

The District Court

> regard[ed] it as a fundamental truism that the availability to, or expectation or receipt of a substantial weekly tax-free payment of money by, a striker is a substantial factor affecting his willingness to go on strike or, once on strike, to remain on strike, in the pursuit of desired goals. [28a; footnotes omitted]

It, however, did not simply rely on this truism. In making its findings of fact, it found in the extensive record before it "confirmation of . . . [the truism] everywhere" (28a).

The present case arose out of the seven-month long strike in 1971-1972 against petitioners by the New York locals of the Communications Workers of America (AFL-CIO) ("CWA"), during which some $49,000,000 in unemployment insurance benefits were paid to some 33,000 strikers.

In June of 1971, the CWA recommended a nationwide strike, which began on July 14. On July 18 an agreement in principle, subject to ratification by mail, was reached and the CWA ordered all employees back to work on July 21. Despite this directive by the International CWA, roughly 38,000 CWA members employed by the New York

[5] The maximum was $75.00 during the 1971-1972 strike involved in this case.



Telephone Company ("Telco") and Empire City Subway Company (Limited) ("Empire") remained on strike in New York. Employees of Western Electric Company ("Weco") and of American Telephone & Telegraph Company, Long Lines Department ("Long Lines") also stayed off the job in New York. CWA-represented employees outside of New York, however, returned to work.

A national membership ratification vote was set for August 14, 1971, and both CWA and its top official in New York State strongly endorsed the ratification. The balloting resulted in a resounding ratification of the contract in every CWA bargaining unit across the country with the exception of the New York State unit for Telco and Empire, and the strike was continued in New York.[6]

During the first week of September 1971 the strikers became eligible for weekly unemployment compensation in a tax-free amount "adequate or almost adequate to meet essential needs" (37a) and, as previously mentioned, benefit payments to the strikers amounted to some $49,000,000 before the strike ended.

The substantial impact of these payments to strikers on the CWA strike and on the collective bargaining of both the union and the struck employers is summarized in the opinion of the District Court (26a-32a). Illustrative of this impact was the description at trial by Telco's chief negotiator of how the availability and payment of unemployment compensation to the strikers was an important consideration in shaping his bargaining position. Thus, Telco's position during the early months of the strike was premised in large part on the belief that the attempt

[6] The strike was subsequently ruled illegal by the National Labor Relations Board in *Communications Wkrs. of America (New York Tel. Co.)*, 208 N.L.R.B. 267 (1973). 28a.

by CWA's locals in New York to break the national pattern "could only lead to labor turmoil throughout the Bell System" and, accordingly, should be firmly resisted. After a number of months had passed, however,

> Telco saw that the strike would not end without some concession to union demands and, noting that employees were still eligible for six or more months of unemployment compensation, decided to settle along the lines recommended by the federal mediator. [27a]

The importance of the expectation and receipt of unemployment compensation to CWA and its striking members is also unmistakable in CWA's own statements on the subject. Shortly after the strike, the union's strike leader, a Vice President of the International, wrote to the New York CWA employees:

> The fact that more than 80% of the membership stood together for 218 days is simply incredible. In my judgment, it is a testimonial to three phenomena:
>
> 1. Dedication and spirit of the strikers
> 2. Unemployment insurance
> 3. Effectiveness of CWA's defense fund [P. Exh. 159]

The extent and nature of the impact of unemployment compensation on collective bargaining and strikes generally cannot be fully appreciated without sampling the flavor of union statements such as the foregoing. The District Court's opinion culled but a few examples[7] from the hundreds placed in evidence. The District Court found further support for petitioners' position in the testimony of distinguished experts called by petitioners (pursuant to the suggestion made in the opinion in *Grinnell Corp.* v. *Hackett*, 475 F.2d 449, 459 (1st Cir.), *cert. denied*, 414 U.S. 858, 879 (1973)) and in statistical and empirical studies offered by them (33a-38a).

[7] Those emanating from the CWA strike against petitioners are discussed at 29a-32a; those from other strikes by the CWA as well as other major unions appear at 32a-33a.



## The Reasons for Granting a Writ

The proven "conflict between New York's statute and the broad federal policy of free collective bargaining" (17a) is one of pervasive and substantial proportions. It calls for review by this Court of the opinion below so that it may settle the important question of whether Congress has manifested an intent to narrow the scope of its uniform labor policy by permitting state laws which pay unemployment compensation to strikers and which force employers to finance strikes against themselves.

The Second Circuit's decision is in conflict with the decision of the First Circuit in *Grinnell Corp.* v. *Hackett*, *supra*, and with the reported decisions of all federal district courts in the same and other circuits which have ruled on the same subject matter. These include district courts in New York, Hawaii and Michigan.

The opinion below, as we shall show, is also in basic conflict with this Court's decision in *Nash* v. *Florida Indus. Comm'n*, 389 U.S. 235 (1967), and with its decisions in other cases defining the scope and force of the labor law preemption doctrine.

This case is of fundamental importance in the labor-management field and numerous lawsuits around the country raising questions the same as or kindred to those presented here are pending in various stages of litigation. There are presented here conflicts and divisions among the courts which, we submit, urgently need resolution.

**1. *The Decision Below Is in Conflict With the Decision of Another Court of Appeals and With Those of Several District Courts in the Same and Other Circuits on the Same Subject Matter.***

The District Court in this case found that the New York Unemployment Insurance Law, insofar as it grants unemployment compensation to strikers, (a) constitutes state intervention on their behalf, (b) tips the economic scales in their favor and (c) forces New York employers to subsidize lengthy strikes against themselves, all in conflict with the preemptive federal labor policy of government neutrality in labor disputes (28a, 45a, 54a). It accordingly declared the statute, to the extent it subsidized strikers, invalid under the Supremacy Clause of the United States Constitution (20a, 54a).

Although the Court of Appeals opinion implicitly accepted the District Court's findings concerning the head-on conflict and substantial interference with the federal scheme, it nevertheless reversed, concluding that the federal labor policy must give way since

> the conflict between New York's statute and the broad federal policy of free collective bargaining does not render the State statute unconstitutional. The conflict is one which Congress has decided to tolerate. [17a]



This "inference" was drawn, as the Court of Appeals acknowledged, in the absence of any "*positive* expression of congressional intent" (emphasis supplied) and in disagreement and conflict with the decisions of all "[t]hose courts that have considered Congress' intent with respect to the payment of unemployment benefits to strikers" (7a).

After an in-depth review and analysis of congressional intent and of the very same legislative history on the subject of unemployment compensation for strikers as here considered, the Court of Appeals for the First Circuit in *Grinnell Corp.* v. *Hackett*, concluded that:

> the existing legislative record is not sufficiently clear to establish Congressional intent either way . . . . [475 F.2d at 454]

And further, at page 457:

> The *most* that can fairly be said, in the face of this legislative record, is that Congress has been aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances.
>
> [*U*]*nambiguous Congressional intent is lacking* . . . . [Emphasis supplied]

Finding no controlling legislative intent either way, the First Circuit in *Grinnell* reversed the dismissal of the complaint which challenged payments to strikers under Rhode Island's unemployment compensation statute (almost identical to New York's), and remanded the case for trial. Its opinion blueprinted the kinds of proof on the issue of preemption which should be adduced at trial by plaintiff. It

is clear from the findings below in the case at bar that petitioners have supplied that proof here. The *Grinnell* case has yet to be tried.

The preemption issue posed here was the subject of a decision reached after a plenary trial in another case involving the payment of unemployment compensation to strikers. *Hawaiian Tel. Co.* v. *State of Hawaii Dep't of Labor & Indus. Rel.*, 405 F. Supp. 275 (D. Hawaii 1975), *appeals docketed* (9th Cir. Mar. 19 and May 12, 1976) (Nos. 76-1584, 76-2056). The district court there, after granting a preliminary injunction against the continued operation of the Hawaiian law,[8] tried the case. Having found, after trial, that the Hawaiian law exerted a substantial impact on collective bargaining and strikes, it thereupon concluded that Hawaii's statute irreconcilably intruded into the federal process of free collective bargaining and, in the absence of any congressional approval, must be nullified. 405 F. Supp. at 290.

On the subject of congressional intent, the court, in agreement with the First Circuit, said:

> There is no point in this decision to retrace the same road toward determination of Congressional intent that was so laboriously trudged by Judge Coffin in *Grinnell*. On the broad problem of payment of unemployment compensation to strikers, this court agrees with *Grinnell*, at 457 that "unambiguous Congressional intent is lacking" . . . . [405 F. Supp. at 286]

The same labyrinth of legislative history was also traversed by the court in *Dow Chem. Co.* v. *Taylor*, 57 F.R.D.

[8] *Hawaiian Tel. Co.* v. *State of Hawaii Dep't of Labor & Indus. Rel.*, 378 F. Supp. 791 (D. Hawaii 1974).



105 (E.D. Mich. 1972), and was again found inconclusive.[9] The state law there, on its face, barred unemployment insurance benefits in labor disputes, but it was being circumvented. In denying defendants' motion to dismiss Dow's challenge to payments, the court stated:

> This court does not believe, as defendants and intervenors suggest, that congressional inaction or failure to pass particular amendments to unemployment tax laws result in a definitive statement of congressional intent. [57 F.R.D. at 108]

In the case at bar the District Court judge *twice* retraced the very same ground covered by the courts in the *Grinnell, Dow* and *Hawaiian Telco* cases, first on respondents' motion for summary judgment and again at trial, and reached the very same conclusion as did those other courts.

Another district court judge in the Second Circuit recently was presented with the same issue of congressional intent, this time in the context of a motion for a preliminary injunction restraining the State of New York from paying unemployment compensation to striking employees in a dispute between a television broadcasting company and the union representing its engineers. *American Broadcasting Cos.* v. *New York State Dep't of Labor*, 77 Civ. 2995 (S.D. N.Y. June 30, 1977). Judge Cannella, citing *Grinnell*, there stated:

[9] An appeal to the Sixth Circuit has been certified in this case on a different issue. *Dow Chem. Co.* v. *Taylor*, 428 F. Supp. 86 (E.D. Mich. 1977), *certified to 6th Cir.* (E.D. Mich. May 19, 1977) (No. 77-8064).

> Conflicting inferences may be drawn from the legislative history accompanying the federal labor laws such that congressional intent is difficult to fathom. [Mem. and Order, p. 5]

Agreeing with Judge Owen "that the expectation of unemployment benefits is a significant factor in prolonging a strike", he granted the preliminary injunction there sought. *Id.*

**2. *The Decision Below Raises Significant Questions of Federal Law Which Have Not Been, But Should Be, Settled Concerning the Application of This Court's Labor Law Preemption Doctrine to State Laws Granting Unemployment Compensation to Strikers.***

The precise questions posed herein have never previously been presented to this Court on a record remotely resembling the completeness with which this one reveals the substantial impact of the promise and grant of unemployment benefits on collective bargaining.[10]

The record facts in this case indicate an increasing resort by unions and their striking members to state-granted, but employer-financed, unemployment compensation benefits and the use of such benefits as a strike weapon to complement or replace the unions' own strike funds. This has in recent years produced a swelling volume of litigation in

[10] This Court summarily dismissed, for want of a substantial federal question, the appeal in *Kimbell, Inc.* v. *Employment Security Comm'n*, 429 U.S. 804 (1976), from a decision of the New Mexico courts upholding that state's payment of unemployment compensation to strikers in certain limited circumstances. That case involved a different statute and a minimal record on impact. The state court's decision on review, moreover, did not consider legislative intent. Both of the courts below distinguished *Kimbell* from the case at bar (7a n.2, 48a-53a).



federal and state courts across the country challenging the validity of such payments on the very grounds here asserted. Cases, in addition to the one at bar, which are now pending before the federal courts include *Grinnell, supra; Hawaiian Telco, supra;*[11] *Dow, supra; Shell Oil Co.* v. *Brooks*, No. C74-1935 (W.D. Wash.); *Otis Elevator Co.* v. *New York State Dep't of Labor*, 75 Civ. 6463 (S.D.N.Y.); *General Elec. Co.* v. *New York State Unemployment Ins. Fund*, Civil Action No. 75-602 (N.D.N.Y.); *Hawaii Employers Council* v. *State of Hawaii Dep't of Labor & Indus. Rel. (Pearl Harbor Fed. Credit Union)*, Civil No. 74-262 (D. Hawaii); *Hawaii Employers Council* v. *State of Hawaii Dep't of Labor & Indus. Rel. (Edward D. Sultan Co.)*, Civil No. 74-285 (D. Hawaii); *Westinghouse Broadcasting Co.* v. *Commonwealth of Massachusetts*, Civil Action No. 76-1409-S (D. Mass.); *American Broadcasting Cos., supra; Eagle Elec. Mfg. Co.* v. *New York State Dep't of Labor*, 77 Civ. 3925 (S.D.N.Y.); *Jarl Extrusions, Inc.* v. *Ross*, Civil Action No. 77-412 (W.D.N.Y.); *Ford Aerospace & Communications Corp.* v. *State of Hawaii Dep't of Labor & Indus. Rel.*, Civil No. 75-44 (D. Hawaii); *Mail-Well Envelope Co.* v. *State of Hawaii Dep't of Labor & Indus. Rel.*, Civil No. 75-131 (D. Hawaii); *Spargo Wire Co.* v. *New York State Unemployment Ins. Fund*, 77-Civ.-520 (N.D.N.Y.). The sheer volume of such litigation and the conflicts and confusion which the decision at bar has created call for review of the issues presented herein.

Both the importance of these questions and the fact that they have yet to be settled were highlighted by this Court

[11] We are advised that the employer in *Hawaiian Telco* (now pending before the Ninth Circuit) intends to file a petition for certiorari prior to circuit court determination in order that that case may be decided contemporaneously with the one at bar.

in its May 31, 1977, ruling in *Ohio Bureau of Employment Services* v. *Hodory,* 45 U.S.L.W. 4544, 4545 n.3 (No. 75-1707), which carefully and explicitly safeguarded for future determination the issue of whether Ohio's unemployment compensation law was in any way preempted by the National Labor Relations Act.[12]

The decision of the Court of Appeals here, if permitted to stand, would sanction the continuation of a proven and substantial interference with federal labor policy. Recent pronouncements by this Court have confirmed the vitality of the labor preemption doctrine and the Court's vigilance in furtherance of its protection has been manifested by its grant of review in important cases arising from attempts to circumvent or narrow the scope of that doctrine. *E.g., Lodge 76, IAM* v. *Wisconsin Employment Rel. Comm'n,* 427 U.S. 132 (1976) (state law making a concerted refusal to work overtime an unfair labor practice preempted); *Connell Constr. Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975) (state antitrust law assuming to regulate certain union organizational activities preempted); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin,* 418 U.S. 264 (1974) (state libel law preempted insofar as it provided for remedies against union publication which was neither reckless nor contained a knowing falsehood); *Beasley* v. *Food Fair, Inc.,* 416 U.S. 653 (1974) (state "right-to-work" statute preempted because it "flout[ed] the national [labor] policy"); *White Motor Corp.* v. *Malone,* 545 F.2d 599 (8th Cir. 1976), *prob. juris. noted,* 46 U.S.L.W. 3214

[12] Subsequent to *Hodory,* this Court (albeit in a case involving welfare benefits for strikers) again noted, but expressly left open, the labor law preemption issue in *Batterton* v. *Francis,* 45 U.S.L.W. 4768, 4770 n.7 (U.S. June 21, 1977) (No. 75-1181).



(U.S. Oct. 3, 1977) (No. 76-1184); *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters,* 17 Cal. 3d 1893 (Cal. Sup. Ct. 1976), *cert. granted,* 45 U.S.L.W. 3586 (U.S. March 1, 1977) (No. 76-750). This petition requests review of just such a case.

### 3. *The Decision of the Court Below Is in Basic Conflict With Applicable Decisions of This Court and Casts Into Doubt and Uncertainty the Scope and Full Force of the Federal Labor Law Preemption Doctrine.*

#### (a) The Nash Case.

The opinion below places substantial and, indeed, almost controlling reliance on Congress' failure in the Social Security Act, now the Federal Unemployment Tax Act, expressly to forbid the payment of unemployment benefits to strikers. To the court below the unemployment insurance scheme devised by Congress, with the exception of the few standards specified therein, granted to the states all but total freedom to set up any unemployment compensation system they wished; and each state could "serve as a laboratory" and "try novel social and economic experiments without risk to the rest of the country" (11a).

That Congress wished to leave the question of benefits to strikers in the hands of local officials, held the Court of Appeals, may be inferred not only from the "fact that the matter has long been a political 'hot potato'",[13] but also because "the national interest can be served as well by individual State experimentation as by enforced national uniformity" (15a).

[13] This purely speculative explanation in a field where virtually every issue generates its own heat would, if adopted, invite ever-widening state incursions into the area of federal labor law.

But it is "enforced national uniformity" that was and remains the guiding rationale and motivating force underlying the federal labor laws. Indeed, this Court has recognized that the primary factor which led Congress to enact "a comprehensive national labor law" was

> the perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflicts and for equitably and delicately structuring the balance of power among competing forces so as to further the common good. [*Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 286 (1971)]

Senator Williams, Chairman of the Senate Labor Committee and the chief sponsor in the Senate of the most recent amendments to the NLRA concerning health care institutions, also recognized this factor during the debate on those amendments when he said:

> [T]he general purpose of the National Labor Relations Act, as interpreted by the Board and the courts, is to attempt to establish a uniform pattern of collective bargaining rules nationwide, without local variation. [120 Cong. Rec. 22575 (July 10, 1974)]

The national interest in labor relations—promoting labor peace—is not served by local "experimentation" but, as recognized both by Congress and by this Court, may be attained only through a uniform, comprehensive national labor policy. Thus, in finding paramount power in the states to subordinate the national labor policy to state-by-state decisions concerning the allowance of unemployment



insurance benefits to strikers, the decision below attributes to Congress an intent to permit frustration of its own basic purpose in enacting a comprehensive federal labor law.

To the contrary, this Court has declared and consistently applied the principle that any state law conflicting, directly or indirectly, with the policy of free collective bargaining embedded in the federal labor laws must be declared invalid under the Supremacy Clause of the United States Constitution. *See* Cox, *Labor Law Preemption Revisited*, 85 Harv.L.Rev. 1337 (1972), and cases cited therein. It has expressly ruled, moreover, that state unemployment insurance laws are not immune from the operation of the labor preemption doctrine and, accordingly, must yield to the federal superintendence in the labor field. *Nash* v. *Florida Indus. Comm'n*, 389 U.S. 235 (1967).

The opinion of the Court of Appeals in the case at bar significantly omitted any reference to this Court's opinion in *Nash*. And its inference of congressional tolerance of state unemployment insurance laws that conflict with the federal labor policy is in basic conflict with this Court's decision in that case.

In *Nash*, the Court found a violation of the Supremacy Clause in the labor dispute provision of the Florida Unemployment Compensation Law insofar as it denied benefits to a claimant because she filed an unfair labor practice charge with the National Labor Relations Board. The Court concluded that Florida's eligibility requirements in this regard "frustrated" the purposes of the national labor legislation and stood as an "obstacle" to their full accomplishment. 389 U.S. at 240.

As the National Labor Relations Board stated to this Court as an *amicus curiae* in *Nash* (Brief p. 7):

> Within broad limits [a state] is unquestionably free to prescribe the conditions upon which employees are entitled to receive the benefits of the State's unemployment compensation system. Nevertheless, a "state may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" • • • Thus, this Court has frequently set aside State regulatory schemes found to impair rights created by the National Labor Relations Act. See *Hill* v. *Florida*, 325 U.S. 538; *Auto Workers* v. *O'Brien*, 339 U.S. 454; *cf. San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236. And the conditions that a State may impose upon a grant of benefits are likewise subject to scrutiny to insure consistency with federal policy. *It is quite clear a State cannot condition the grant of benefits in a manner that undermines rights protected by the Constitution or frustrates federal legislation.* [Emphasis supplied]

The *Nash* decision stands foursquare against the single thread which runs through the Court of Appeals' opinion in this case, namely, that each state enjoys the unlimited and unrestricted right to establish any eligibility requirements for unemployment compensation it may wish, without regard to the federal labor policy. As this Court observed in *Nash*:

> A national system for the implementation of this country's labor policies is not so dependent on state law. [389 U.S. at 239]



**(b) The Basic Conflict Between the Court of Appeals' Opinion and Both (1) This Court's Preemption Doctrine and (2) the Fundamental Rules of Statutory Construction Applied by This Court.**

In the admitted absence of any "positive expression of congressional intent" on the subject of unemployment compensation for strikers, the court below attempted to construct such intent from unconnected and isolated items of so-called legislative history to support its ultimate conclusion of implied congressional authorization (7a-17a).[14] But these items, construed below as showing congressional inaction in the face of awareness[15] of the problem, do not support the conclusion there reached.

Congress has regulated and occupied the area of labor relations "to the full extent of its Constitutional power under the Commerce Clause," *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees* v. *Wisconsin Employment Rel. Bd.*, 340 U.S. 383, 391 (1951), and, accordingly, no state may enter into this area by legislation or other means which have a "tendency to frustrate" the operation of the federal scheme, *Nash* v. *Florida Indus. Comm'n*, 389 U.S.

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[14] The fallacy of drawing any inference concerning congressional intent from the specific items discussed by the court below is demonstrated by the First Circuit's opinion in *Grinnell, supra*.

[15] The finding of congressional awareness, we believe, is erroneous and will not stand closer scrutiny. It is unlikely that any of the legislative proposals, statements and reports relied upon to support that finding were ever brought to the attention of Congress as a whole. The Senate Report accompanying the Social Security Act, cited by the court below as indicating Congress' awareness and approval (10a-12a) of the striker benefit provision in New York's law, *does not contain any reference whatsoever to that provision*. Nor does the Report discuss or consider the problem of unemployment benefits for strikers, either in general or in the context of specific state laws.

at 239, *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468 (1955), or which "create a substantial risk of conflict with policies central to the federal labor law," [16] *Connell Constr. Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. at 636 (1975). *See also Lodge 76, IAM*, 427 U.S. at 146-47, and *Teamsters Local 20* v. *Morton*, 377 U.S. 252, 259-60 (1964).

Exceptions to the preemption doctrine have been permitted in labor cases only in the narrowest range of circumstances. These have been limited by this Court's decisions to cases where (1) the activity regulated by the state was "a merely peripheral concern" of the federal labor laws (*San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 243-44 (1959); *Lodge 76, IAM*, 427 U.S. at 136-37), (2) it "touched interests so deeply rooted in local feeling and responsibility that . . . [a court] could not infer that Congress had deprived the States of the power to act" (*id.*), or (3) Congress has *"affirmatively indicated"* that the states have the power to act (*Lockridge*, 403 U.S. at 297; emphasis supplied).[17]

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[16] The national policy promoting free collective bargaining, with the right to strike at its core, is just such a policy. *See, e.g., H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970); *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees, Div. 1287* v. *Missouri*, 374 U.S. 74, 82 (1963); *NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 401-03 (1952).

[17] As explained by Professor Cox in his most recent article on labor law preemption,

> [w]here the state law or rule of decision is based upon an accommodation of the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining, or labor disputes . . . the likelihood that its application . . . will upset the balance struck by Congress is so great as *to require exclusion of state law unless Congress has provided otherwise.* [Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1356 (1972); emphasis supplied]



Exempting state unemployment compensation statutes from the broad sweep of the federal labor laws (absent any "*positive* expression of congressional intent" [18]), as did the court below, turns upside down the long-standing presumption in favor of federal preemption of state laws which presume to accommodate the special interests of the parties in collective bargaining or labor disputes.

But the powerful labor preemption doctrine cannot so easily be swept aside. Certainly more than congressional silence[19] is necessary to condone state intrusion into an area this Court has found central to the national labor policy. *Lodge 76, IAM*, 427 U.S. at 149-51.

This Court has cautioned that the proponent of decisions such as that below, which proceed on the basis of a limitation by implication on the scope of established federal policy, "bears a heavy burden of persuasion," *Arnell* v. *United States*, 384 U.S. 158, 165-66 (1966), and cannot succeed unless legislative intent that is "clear and manifest" is demonstrated,[20] *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939). For it is a "cardinal principle of statutory

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[18] 7a; emphasis supplied.

[19] Legislative silence or inaction is a " 'poor beacon' to follow in construing a statute." 2A Sutherland, *Statutory Construction*, §49.10 at p. 261 (4th ed. 1973). "[C]ourts are properly chary of equating mere inaction with approval, in the absence of solid foundation for the inference of conscious ratification." *Duncan* v. *Railroad Retirement Bd.*, 375 F.2d 915, 919 (4th Cir. 1967). "If the failure of enactment of every amendment offered for consideration of Congress were necessarily held to shed light on the legislation sought to be amended, the search for Congressional intention would be endless and fruitless." *United States* v. *Guerlain, Inc.*, 155 F. Supp. 77, 82 (S.D.N.Y. 1957).

[20] The currency of this interpretive principle was reaffirmed but a few weeks ago in a labor case decided by the Court of Appeals for the District of Columbia. *Laborers' Local 1057* v. *NLRB*, 96 L.R.R.M. 3160 (D.C. Cir. Nov. 23, 1977).

construction" that altering or narrowing the scope of an enactment by implication is "not favored." *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 168-69 (1976), and cases cited therein; *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155-58 (1976); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592-98 (1976); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963). Both this caution and the principle it seeks to enforce went unheeded by the Court of Appeals in this case.

That Congress' inaction in the case at bar has spanned a period of over forty years does not increase its "probative value" as a guide to legislative intent as the Court of Appeals believed (16a). For the law on labor preemption is replete with examples of state laws preempted after the passage of extensive periods of time. The several state enactments preempted in *Garmon, supra,* ranged (at the time of this Court's decision in 1959) anywhere from 12[21] to 26[22] to 87[23] years of age. The preempted state laws nullified by this Court's decisions in *Lockridge, Morton* and *Weber, supra,* were Idaho's common law of contract, Ohio's common law of secondary boycotts and Missouri's common law of secondary boycotts, respectively. A 27-year old law was preempted by this Court in *Beasley* v. *Food Fair, Inc., supra,* and one of 16 years' vintage was nullified in *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees, Div. 1287* v. *Missouri,* 374 U.S. 74 (1963).[24]

[21] California Labor Code §§1115-18.

[22] California Labor Code §923.

[23] California Civil Code §1708.

[24] The First Circuit struck down Massachusetts labor laws ranging from 22 to 52 years of age in *General Elec. Co.* v. *Callahan*, 294 F.2d 60 (1961), *cert. dismissed*, 369 U.S. 832 (1962). And in *Oil, Chem. & Atomic Wkers.* v. *Arkansas Louisiana Gas Co.*, 332 F.2d 64 (10th Cir. 1964), a federal court nullified a statute evidently 60 years old on labor preemption grounds.



The preoccupation of the opinion below with the passage of forty years since enactment of New York's statute it would seem blinded it to the perceptions which the trial record in this case yielded as to the extent of that statute's infringement upon modern-day collective bargaining.

## CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
January 4, 1978

Respectfully submitted,

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# APPENDIX

**Opinion of Thomas J. Meskill**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1553—September Term, 1976.

(Argued July 22, 1977 Decided November 9, 1977.)

Docket No. 77-7337

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Plaintiffs-Appellees,*

v.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., State Commissioner of Taxation & Finance,

*Defendants-Appellants.*

Before:

MESKILL, *Circuit Judge,*
BRYAN* and STEWART,** *District Judges.*

* Hon. Frederick vanPelt Bryan, of the Southern District of New York, sitting by designation.

** Hon. Charles E. Stewart, Jr., of the Southern District of New York, sitting by designation.

Appeal from a judgment and order of the United States District Court for the Southern District of New York, Richard Owen, *Judge,* declaring New York's Unemployment Insurance Law, to the extent that it provides for the payment of unemployment compensation to striking employees, to be unconstitutional, enjoining its enforcement and awarding monetary relief.

Reversed and remanded with instructions to dismiss the complaint.

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*cil of New York, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO; International Brotherhood of Teamsters & Warehousemen, Brewery Delivery Employees Local #46; Local 101, Utility Division, Transportation Workers Union of America, AFL-CIO; Local 140, Bedding, Curtain and Drapery Workers Union, United Furniture Workers of America, AFL-CIO; Local 259, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America; Shopmen's Local 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO; Professional and Administrative Staff Association, Museum of Modern Art; United Store Workers Union, Retail, Wholesale and Department Store Union, AFL-CIO; Association of Legal Aid Attorneys, New York, New York; Legal Services Staff Association, New York, New York; Metropolitan Opera Orchestra Committee, New York, New York; United Optical Workers Union, Local 408, International Union of Electrical, Radio and Machine Workers of America, AFL-CIO; Architectural and Engineering Guild Local 66, American Federation of Technical Employees, AFL-CIO.*

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MESKILL, *Circuit Judge:*

New York's Unemployment Insurance Law permits employees who are involved in a "strike, lockout, or other industrial controversy" to collect unemployment compensation after a waiting period of eight weeks. N.Y. Lab. Law §§ 590.9, 592.1 (McKinney 1977). The district court held this statute invalid under the supremacy clause, U.S. Const. art. VI, cl. 2, finding that it alters the balance in the collective bargaining relationship and therefore conflicts with the federal labor policy favoring the free play of economic forces in the collective bargaining process. 434 F.Supp. 810 (S.D.N.Y. 1977). We reverse.

Approximately seventy percent of the Bell System's[1] nonmanagement employees are represented by the Communications Workers of America, AFL-CIO ("CWA"). Prior to 1971, the longstanding collective bargaining format between members of the Bell System and the CWA was one of pattern-settlement. Under this format, the parties would select two Bell System companies with early contract expiration dates as pattern-setters. When an agreement was reached with the pattern-setters, it became the standard for settlement on national issues in the rest of the Bell System.

On April 30, 1971, the contracts of the chosen pattern-setters were due to expire. No agreement was reached, however, and those contracts, along with all other Bell System contracts that were due to expire, were mutually extended on a day-to-day basis. In June, the CWA Inter-

1 The parties have stipulated that the term "Bell System", for the purposes of this lawsuit, includes American Telephone and Telegraph Company ("AT&T"), the twenty-one principal telephone operating companies owned, in whole or in major part, by AT&T and such other companies as Western Electric Company ("Weco") and Bell Telephone Laboratories, Inc. ("Bell Labs"), as well as all of the plaintiffs-appellees, New York Telephone Company ("Telco"), Weco, AT&T, Long Lines Department ("Long Lines") and Empire City Subway Company (Limited) ("Empire").

national recommended a nationwide strike, which began on July 14. On July 18, an agreement in principle, subject to ratification by mail, was reached, and the CWA ordered all employees back to work on July 21. Despite the International's directive, roughly 38,000 CWA members employed by the New York Telephone Company ("Telco") remained on strike in New York. Western Electric Company ("Weco") employees and American Telephone & Telegraph Company, Long Lines Department ("Long Lines") employees also stayed off the job.

On August 14, 1971, the employees of all Bell System companies except Telco and Empire City Subway Company (Limited) ("Empire") ratified the contract. The strike continued in New York for seven months, until February, 1972. Weco and Long Lines employees respected the picket lines of the striking Telco and Empire employees. During the strike, $43,000,000 in unemployment insurance benefits was paid, at an average rate of $75 per week, to 29,000 Telco employees and charged to Telco's account; $5,000,000 in benefits was paid to 4,150 Weco employees; $500,000 in benefits was paid to 350 Long Lines employees; and $100,000 in benefits was paid to 125 Empire employees. Had the strike not been settled, these payments would have continued until July of 1972. New York's unemployment insurance system is financed entirely by employer contributions, so the cost of making these payments was borne by the struck employers.

In a preemption case such as this one, "the crucial inquiry [is] whether Congress intended [this field to] be unregulated because [it was] left 'to be controlled by the free play of economic forces.'" *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976), *quoting NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971). Accordingly,



we must examine congressional intent.[2] Those courts that have considered Congress' intent with respect to the payment of unemployment benefits to strikers have found it "ambiguous." *Grinnell Corp.* v. *Hackett*, 475 F.2d 449, 454-57 (1st Cir.), *cert. denied*, 414 U.S. 858 (1973); *Hawaiian Telephone Co.* v. *Hawaii Department of Labor & Industrial Relations*, 405 F.Supp. 275, 286 (D. Hawaii 1976). We do not agree. Here, as in most preemption cases, a positive expression of congressional intent is lacking, and the Court must resort to the drawing of inferences. In the instant case, the evidence upon which those inferences must be based is not "ambiguous" but is relatively one-sided.

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2 In *Kimbell, Inc.* v. *Employment Security Commission of New Mexico*, 429 U.S. 804 (1976), the Supreme Court dismissed, for want of a substantial question, an appeal which raised, *inter alia*, the question at issue here. *Kimbell, Inc.* v. *Employment Security Commission of New Mexico*, No. 10323 (N.M. Sup. Ct. Dec. 29, 1975), *rev'g, Albuquerque-Phoenix Express, Inc.* v. *Employment Security Commission of New Mexico*, 88 N.M. 596, 544 P.2d 1161 (1975). We must therefore decide whether, under the doctrine of *Hicks* v. *Miranda*, 422 U.S. 332 (1975), the *Kimbell* dismissal is controlling. *See generally* Comment, The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of *Hicks* v. *Miranda*, 76 Colum. L. Rev. 508 (1976). We agree with the district court that it is not. *See also Dow Chem. Co.* v. *Taylor*, 428 F.Supp. 86 (E.D. Mich. 1977). The district court's view has been confirmed by subsequent indications from the Supreme Court itself. *Ohio Bureau of Employment Servs.* v. *Hodory*, 45 U.S.L.W. 4544, 4545 n.3 (May 31, 1977); *Batterton* v. *Francis*, 45 U.S.L.W. 4768, 4770 n.7 (June 20, 1977). We are aware of the contrary decision of the Third Circuit in *Super Tire Eng'ring Co.* v. *McCorkle*, 550 F.2d 903 (3d Cir.), *cert. filed*, 46 U.S.L.W. 3110 (U.S. Aug. 30, 1977), and we respectfully disagree with that Court. We note that *Super Tire* was decided prior to *Hodory* and *Batterton*.

In *Kimbell* the Solicitor General and the NLRB argued to the Supreme Court that "it is apparent that Congress over the years has been aware of the disparate attitudes in the states as to the advisability of allowing strikers access to unemployment benefits and has decided to permit the diversity to continue." Brief for the United States as Amicus Curiae at 8, *Kimbell, Inc.* v. *Employment Security Commission of New Mexico*, 429 U.S. 804 (1976).

The question whether striking workers should be entitled to benefit from various forms of social welfare legislation has been a significant political issue since the early 1930s. In *Grinnell,* the First Circuit considered congressional awareness of the issue prior to the enactment of the National Labor Relations Act and the Social Security Act:

> In July 1933, the Federal Emergency Relief Administration (FERA) ruled that it would not "attempt to judge the merits of labor disputes" but would treat unemployed strikers like all other unemployed persons for purposes of relief. Brown, Public Relief 1929-39, 270 (1940). This policy became a bone of contention during the textile strike of September 1934. Bernstein, The Turbulent Years: A History of the American Worker 1933-41 (1971). Congress could hardly have been unaware of this policy when in 1935 it passed in close succession both the National Labor Relations Act . . . and the Social Security Act . . . .

475 F.2d at 454. The National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (July 5, 1935), *as amended,* 29 U.S.C. § 151 *et seq.* ("NLRA"), makes no mention of unemployment compensation. On the other hand, Title IX of the Social Security Act, Pub. L. No. 74-271, §§ 901-910, 49 Stat. 639-45 (Aug. 14, 1935), which is now the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-09, was part of a legislative program "to stimulate the creation of and payment to State unemployment compensation funds." *United States* v. *Spencer,* 65 F.Supp. 763, 764 (D. Mass. 1946) (Wyzanski, *J.*), *aff'd in part, rev'd in part sub nom. Massachusetts* v. *United States,* 160 F.2d 614 (1st Cir. 1947), *aff'd,* 333 U.S. 611 (1948). It was designed to deal with the urgent national problem of unemployment. *See Steward Machine Co.* v. *Davis,* 301 U.S. 548, 586-88 (1937). This



was done by imposing a federal excise tax on employers, while giving a tax credit to those who made contributions to qualified State plans. In order for a State plan to qualify, the State's law had to meet certain requirements, including three designed "to insure the compatibility of state unemployment compensation laws with the then brand-new labor statute." *Grinnell, supra,* 475 F.2d at 454-55. Under the statute, a State law could not deny benefits to individuals who refused to accept new work for any of the following reasons:

> (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;
>
> (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
>
> (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization . . . .

Social Security Act § 903(a)(5), 49 Stat. 640, 26 U.S.C. § 3304(a)(5). The significance of this provision was considered in *Ohio Bureau of Employment Services* v. *Hodory,* 45 U.S.L.W. 4544 (U.S. May 31, 1977). In that case, the Supreme Court faced the question whether a State statute barring the payment of unemployment benefits to strikers was preempted by certain federal statutes.[3] The Court specifically examined the provisions quoted above and concluded:

> [W]hen Congress wished to impose or forbid a condition for compensation, it was able to do so in explicit

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3 The Supreme Court expressly declined to consider the preemptive effect of the NLRA on the statute at issue. 45 U.S.L.W. at 4545 n.3.

> terms. There are numerous examples, in addition to [26 U.S.C. § 3304(a)(5)], less related to labor disputes but showing a congressional ability to deal with specific aspects of state plans. The fact that Congress has chosen not to legislate on the subject of labor dispute disqualifications confirms our belief that neither the Social Security Act nor the Federal Unemployment Tax Act intended to restrict the States' freedom to legislate in this area.

*Id.* at 4549 (footnotes omitted).

The failure of Congress to forbid the payment of benefits to strikers takes on additional significance in light of the fact that it had been urged to do so. Hearings on S. 1130 before the Senate Comm. on Finance, 74th Cong., 1st Sess. 228 (1935) (Edmund Witte, Executive Director, President's Committee on Economic Security, recommendation on behalf of Advisory Council); *id.* at 472 (Dr. Abraham Epstein, American Association for Society Security, proposed draft of bill); *id.* at 959 (statement of Noel Sargent, National Association of Manufacturers). The Senate Committee Report stated:

> Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington.

S. Rep. No. 628, 74th Cong., 1st Sess. 13 (1935), *reprinted in* 1 Social Security: Documentary History of the Social Security Act of 1935 (1942); *see* H.R. Rep. No. 615, 74th Cong., 1st Sess. 8-9 (1935), *reprinted in* 1 Social Security: Documentary History of the Social Security Act of 1935



(1942). *See also, Hodory, supra,* 45 U.S.L.W. at 4547-48.[4] This expression of congressional intent to avoid excessive intrusion into local affairs is entirely consistent with the doubt that existed at that time concerning Congress' power to enact legislation of this character without encroaching to an unconstitutional degree on the powers of the States. In *Stewart Machine Co.* v. *Davis, supra,* for example, Justices McReynolds, Sutherland, Van Devanter and Butler dissented on Tenth Amendment grounds from the judgment upholding the Social Security Act. *Cf. National League of Cities* v. *Usery,* 426 U.S. 833 (1976). The New York statute, the Social Security Act and the NLRA were each born of an era which had not forgotten that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, *J.*, dissenting).

Moreover, it is particularly noteworthy that Congress was aware of the New York statute when it enacted the NLRA and the Social Security Act. The New York statute had taken effect on April 25, 1935, two months before the NLRA and almost four months before the Social Security Act.[5] Indeed, the Senate Report to the Social Security

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4 An analysis of the Social Security Bill published in the New York Times on August 10, 1935, reported that, "[t]he bill allows the States the widest discretion in setting up their own requirements," and, again, that, "[t]he States have the widest possible latitude to set up their own unemployment compensation systems . . . ." N.Y. Times, Aug. 10, 1935, at 4, col. 2, *reprinted in* 79 Cong. Rec. 13079 (1935).

5 The public policy underlying New York's statute is stated in § 501 of the Labor Law:

> **Public policy of state**
>
> As a guide to the interpretation and application of this article, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health,

Act cited New York as one of the five States with a statute of the sort that Congress sought to encourage other States to enact. S. Rep. No. 628, *supra,* at 11. Within the next few years, the Social Security Board approved New York's statute, along with three others which authorized the payment of benefits to strikers. The Secretary of Labor, whose responsibility it now is to certify State laws on an annual

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welfare, and morale of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden, which now so often falls with crushing force upon the unemployed worker and his family. After searching examination of the effects of wide spread unemployment within the state, the joint legislative committee on unemployment appointed pursuant to a joint resolution adopted April ninth, nineteen hundred and thirty-one, reported to the legislature that "the problem of unemployment can better be met by the so-called compulsory unemployment insurance plan than it is now handled by the barren actualities of poor relief assistance backed by compulsory contribution through taxation. Once the facts are apprehended this conclusion is precipitated with the certainty of a chemical reaction." Taking into account the report of its own committee, together with facts tending to support it which are matters of common knowledge, the legislature therefore declares that in its considered judgment the public good and the well-being of the wage earners of this state require the enactment of this measure for the compulsory setting aside of financial reserves for the benefit of persons unemployed through no fault of their own.

N.Y. Lab. Law § 501 (McKinney 1977).

New York's provision of benefits to strikers after eight weeks represents a good faith attempt to strike a balance between neutrality in the collective bargaining process—which the State maintains for the first eight weeks—and the social and economic well-being of its citizens—an interest which lies well within its legislative powers. *W.H.H. Chamberlin, Inc.* v. *Andrews,* 159 Misc. 124, 286 N.Y.S. 242 (Sup. Ct. Onondaga County), *modified,* 271 N.Y. 1, 2 N.E.2d 22, *aff'd without opinion by an equally divided Court,* 299 U.S. 515 (1936).

Harold Kasper, the Director of the Unemployment Insurance Division of the New York Department of Labor, testified at trial that the three most important objectives of the statute were (1) to "cushion the economy" by keeping in circulation money which the strikers would ordinarily spend on food, housing and the like; (2) to aid the striker to pay essential expenses; and (3) to maintain a labor force for the struck employer until the strike is over.



basis, has consistently approved New York's law. The significance of this fact is limited, because they were required to approve all laws that met the minimum requirements of 29 U.S.C. § 3304(a). *Hawaiian Telephone Co., supra,* 405 F.Supp. at 285. Nevertheless, the Secretary's continuing review is relevant. Government administrators serve as conduits through which the executive and, eventually, the legislative branches obtain information concerning the operation of the laws for which the administrators are responsible. The greater the oversight, the more likely it is that Congress will be aware of State statutes which are or have become "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941) (footnote omitted).

The next opportunity Congress had to consider whether unemployment compensation should be paid to strikers was in 1947 when the House of Representatives considered and passed the Hartley Bill, which excluded striking employees who accepted unemployment compensation from the definition of "employee" under § 2(3) of the NLRA and thereby effectively denied them the protections of the Act. H.R. 3020, 80th Cong., 1st Sess. (1947), *reprinted in* 1 *NLRB, Legislative History of the Labor Management Relations Act, 1947* 158 (1948). The House Report stated that this was appropriate because the payment of such benefits was a "perversion" of the purposes of social security legislation. H.R. Rep. No. 245, 80th Cong., 1st Sess. 12 (1947), *reprinted in* 1 *NLRB, Legislative History of the Labor Management Relations Act, 1947* 303 (1948). The Minority Report argued that "[u]nder the Social Security Act . . . the determination of these matters was advisedly left to the States." *Id.* at 68 (Minority Report), *reprinted in* 1 *NLRB, Legislative History of the Labor Management Relations Act, 1947* 359 (1948). The Senate

Bill did not contain the exclusion, and the Senate version was accepted by the Conference Committee with little further discussion. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32-35, *reprinted in* [1947] U.S. Code Cong. & Ad. News 1135, 1137-41; 1 *NLRB, Legislative History of the Labor Management Relations Act, 1947* 536-39 (1948); *see* Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, § 101, 61 Stat. 136 (1947).

In 1969 Congress again considered these matters. President Nixon sought legislation amending the Federal Unemployment Tax Act to include a "requirement that [the] practice of paying unemployment insurance benefits to workers directly engaged in a strike be discontinued." Message from the President, 115 Cong. Rec. 18538 (1969). The proposal was not adopted. Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 695 (1970). The reason for its rejection, as explained by Committee Chairman Mills on the floor of the House, was that:

> We have tried to keep from prohibiting the States from doing the things the States believe are in the best interest of their people. There are a lot of decisions in this whole program which are left to the States.
>
> For example, there are two States [New York and Rhode Island] which will pay unemployment benefits when employees are on strike, but only two out of 50 make that decision. That is their privilege to do so. They are taxing their employers within the State to pay unemployment benefits. If the legislature wants to do it, why not let them do it? I would not vote for it . . . but if the State wants to do it we believe they ought to be given latitude to enable them to write the program they want.

115 Cong. Rec. 34106 (1969).



Considering the fact that the matter has long been a political "hot potato," it is not at all surprising that Congress would wish to leave it in the hands of local officials. However, congressional intent need not be inferred from the possibility of political timidity; the national interest can be served as well by individual State experimentation as by enforced national uniformity. *See New State Ice Co. v. Liebmann, supra,* 285 U.S. at 311 (Brandeis, *J.*, dissenting).

As the Supreme Court noted in *Hodory, supra,* Congress has shown an ability to deal with specific aspects of State plans. 45 U.S.L.W. at 4549. In 1976, for example, Congress amended the Unemployment Tax Act to prohibit the payment of unemployment compensation to athletes during the off season, Act of Oct. 20, 1976, Pub. L. No. 94-566, § 314(a)(13), 90 Stat. 2667, 2680, 26 U.S.C. § 3304(a)(13), and to illegal aliens, *id.*, § 314(a)(14), 90 Stat. at 2680, 26 U.S.C. § 3304(a)(14). On the other hand, Congress prohibited the States from denying benefits on the basis of pregnancy. *Id.*, § 312(a)(12), 90 Stat. at 2679, 26 U.S.C. § 3304(a)(12).

In other contexts, Congress has itself afforded benefits to striking workers. The Railroad Unemployment Insurance Act, Pub. L. No. 75-722, 52 Stat. 1094 (1938), *as amended,* 45 U.S.C. § 351 *et seq.*, provides for the payment of benefits to those who participate in lawful strikes. *Id.* § 4(c), 52 Stat. at 1099, *as amended,* 45 U.S.C. § 354(a-2)(iii). The Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703, *as amended*, 7 U.S.C. § 2011 *et seq.*, was changed in 1971 to establish a set of uniform national standards of eligibility for food stamps, and expressly provides that strikers are not disqualified. Act. of Jan. 11, 1971, Pub. L. No. 91-671, § 4, 84 Stat. 2048, 2050, 7 U.S.C. § 2014(c). Finally, Congress has left the States free to determine whether benefits under the Aid to Fam-

ilies with Dependent Children program, 42 U.S.C. § 601 *et seq.*, may be denied to the children of strikers. *See Batterton* v. *Francis,* 45 U.S.L.W. 4768 (U.S. June 20, 1977).

We are aware of only one exception to the rule that Congress has either provided for benefits to strikers or left the matter to the States. In the unemployment laws of the District of Columbia, benefits are denied to strikers. However, this fact is of limited significance. "Because the District has no Congressional vote, Congress legislates for the District in a relative political vacuum . . . ." *Hawaiian Telephone Co., supra,* 405 F.Supp. at 285.

Our review of the relevant legislative history discloses no clear preemptive intent; indeed, virtually all the evidence is to the contrary. As mentioned above, the question whether striking employees should be afforded unemployment compensation has been a significant political issue since the early 1930s. In 1935, at a time when Congress sought to encourage the States to enact unemployment compensation statutes, New York was in the forefront, and its law granted compensation to strikers. For over forty years, Congress has been aware of the issue in general, and of New York's program in particular. "Congressional awareness, the availability of opportunities to act, and Congressional action in closely related matters," *Grinnell, supra,* 475 F.2d at 454, are all relevant in trying to determine Congress' intent, and all are present here. Moreover, their probative value increases over time. A long-standing practice "is not something to be lightly cast aside." *Walz* v. *Tax Commission,* 397 U.S. 664, 678 (1970). Accordingly, we hold that, notwithstanding the general rule that State statutes which touch or concern labor relations should be neutral, *Lodge 76, International Association of Machinists,* v. *Wisconsin Employment Relations Commission, supra,* 427 U.S. at 149-50, and despite the otherwise broad pre-



emptive scope of the federal labor laws, Congress has not expressed an intent to preempt State unemployment compensation laws that provide benefits to strikers. Quite to the contrary, it has evinced an intention to leave the States free to regulate in this area. Therefore, the conflict between New York's statute and the broad federal policy of free collective bargaining does not render the State statute unconstitutional. The conflict is one which Congress has decided to tolerate.

Several additional matters remain to be considered. In their fifth and sixth causes of action, the plaintiffs allege violations of the due process and equal protection clauses of the Fourteenth Amendment. In a memorandum denying the defendants' motion for summary judgment, Judge Owen expressed "substantial doubt that § 592.1 is so irrational as to be violative of" either of those clauses.[6] He reserved decision on the defendants' motion insofar as it related to these causes of action, pending the development of a full trial record. In a post-trial memorandum, plaintiffs argued that New York's statute impermissibly treated employers of striking employees in the same manner as employers of employees who were involuntarily unemployed. Plaintiffs relied primarily upon the decision of a three-judge district court in *Hodory* v. *Ohio Bureau of Employment Services,* 408 F.Supp. 1016 (N.D. Ohio 1976). Judge Owen, in his decision of May 23, 1977, did not reach the Fourteenth Amendment issue; his conclusion regarding the preemption issue made it unnecessary to do so. Under such circumstances, our reversal on the preemption issue would ordinarily require us to remand for further consideration of the Fourteenth Amendment issue. However, on May 31, 1977, the Supreme Court reversed the district court decision in *Hodory* and upheld, against an

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6 See note 5, *supra.*

equal protection challenge, a State statute that did not pay benefits to strikers. The Court explained that "[t]he decision of the weight to be given the various effects of the statute [on employers and employees], however, is a legislative decision, and appellee's position is contrary to the principle that 'the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.'" 45 U.S.L.W. at 4549-50, *quoting Dandridge* v. *Williams,* 397 U.S. 471, 486 (1970). In view of *Hodory,* a remand for further consideration of the issue would be a futile gesture. Finally, we are as puzzled by the plaintiffs' allegation of a due process violation as the Supreme Court was of a similar allegation in *Hodory.* 45 U.S.L.W. at 4550. Plaintiffs have never alleged a violation of their right to procedural due process, and the question whether New York's statute violates an employer's substantive due process rights has been resolved by the Supreme Court. *W.H.H. Chamberlin, Inc.* v. *Andrews,* 159 Misc. 124, 286 N.Y.S. 242 (Sup.Ct. Onondaga County), *modified,* 271 N.Y. 1, 2 N.E.2d 22, *aff'd without opinion by an equally divided Court,* 299 U.S. 515 (1936).

Accordingly, the judgment of the district court is reversed, and the case is remanded with instructions to dismiss the complaint.



**Declaratory Judgment and Order**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4557

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Plaintiffs,*

—against—

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., State Commissioner of Taxation and Finance,

*Defendants.*

DECLARATORY JUDGMENT AND ORDER FOR PERMANENT INJUNCTION

This action having come on for trial before the Court without a jury (Honorable Richard Owen, United States District Judge, presiding), the issues of liability having been duly tried and the Court, on May 23, 1977, after due deliberation, having rendered its Opinion and Order, containing its findings of fact and conclusions of law, and said Order and Opinion having been entered by the Clerk

of the United States District Court for the Southern District of New York on May 24, 1977,

Now, on motion of Aranow, Brodsky, Bohlinger, Benetar & Einhorn, attorneys for plaintiffs,

IT IS HEREBY ADJUDGED, ORDERED AND DECLARED, on the basis of the aforementioned findings of fact and conclusions of law, that Article 18 of the New York Labor Law ("the Unemployment Insurance Law"), to the extent it provides for the payment of unemployment compensation to strikers, is unconstitutional and void under the United States Constitution.

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that, with respect to industrial controversies involving plaintiffs or any other employer engaged in interstate commerce or in an industry affecting interstate commerce as defined in the National Labor Relations Act and to related claims for unemployment compensation arising therefrom, defendants, their successors in office, agents, employees, and all other persons attempting or purporting to do so, are hereby permanently enjoined from (a) enforcing the New York State Unemployment Insurance Law to the extent that it provides for the payment of unemployment compensation to strikers, (b) authorizing the payment of unemployment compensation to strikers and (c) drawing vouchers on the accounts maintained to effectuate the payment of such compensation.

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that defendants, their successors in office, agents, employees, or any other persons empowered to do so, shall, within eight



weeks after the entry of this Declaratory Judgment and Permanent Injunction, (a) recredit plaintiffs' respective unemployment insurance accounts, retroactive to the commencement of benefit payments to strikers in 1971, for the amounts paid out in unemployment compensation as a result of the 1971-1972 strike by the Communications Workers of America ("CWA") against plaintiffs, (b) accurately recompute plaintiffs' unemployment insurance normal tax rates for each and every year since 1971 in light of such credits, providing such computations to the Court and to plaintiffs, and (c) put into effect, retroactively to January 1, 1977, the 1977 normal tax rates as so computed.

The Court having requested the parties herein to stipulate, to the extent possible, the amount of unemployment insurance tax payments made by plaintiffs since January 1, 1972, in excess of such taxes as would have been due and payable if unemployment compensation had not been paid to strikers during the 1971-1972 CWA strike against plaintiffs,

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that any questions not stipulated concerning the amount of said excess payments, recoupment of same, interest and costs shall be determined in a subsequent proceeding to be scheduled by the Court.

FURTHERMORE, the Court, expressly determining under Rule 54(b) F.R.Civ. P. that there is no just reason for delay in entering final judgment (except for the specific matters to be determined in a subsequent proceeding), as

*Declaratory Judgment and Order*

set forth hereinabove, hereby expressly directs the entry of such final judgment and the same hereby is entered.

So Ordered.

Dated: New York, New York
June 24, 1977

RICHARD OWEN
*United States District Judge*

Entered this 28 day of
June 1977.

RAYMOND F. BURGHARDT
*Clerk*



**Opinion of Richard Owen,**
**United States District Judge**

[434 F. Supp. 810]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 73 Civ. 4557

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NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Plaintiffs,*

—v.—

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., State Commissioner of Taxation and Finance,

*Defendants.*

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May 23, 1977

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Aranow, Brodsky, Bohlinger, Benetar & Einhorn by David L. Benetar, George E. Ashley, William P. Witman, Stanley Schair, Mark H. Leeds, New York City, for plaintiffs.

Louis J. Lefkowitz, Atty. Gen. by Maria L. Marcus, Stuart I. Greenberg, Ralph L. McMurry, Asst. Attys. Gen., Nicholas G. Garaufis, Deputy Asst. Atty. Gen., New York City, for defendants.

OWEN, District Judge.

In 1971 most employees of the entire nationwide Bell Telephone Company system (Bell System) went on strike. Within days, the strike was settled and there was a return to work at all units except those in New York State, where employees continued on strike for seven months. After the first eight weeks, many of the striking employees began receiving as much as $95.00 per week tax-free as unemployment compensation under New York law, which continued for the duration of the strike. By its conclusion, the strikers had received some $49,000,000 from the Compensation Fund and the New York Telephone Company (Telco) was faced with making up a $40,000,000 depletion in its credit in the said Fund.

The plaintiffs, New York State units of the Bell System, brought suit for the recovery of funds paid, to restore its lost credit position, and for a declaration that New York Labor Law § 500 *et seq.*, to the extent it mandates payment of unemployment compensation to strikers[1] is unconstitutional. By stipulation the liability issues were severed and separately tried.

The two principal questions raised on the non-jury trial before me are (1) whether the availability, receipt or expected receipt of unemployment insurance benefits for strikers under New York law exerts a significant impact on (a) collective bargaining and the demands and positions of the parties taken in connection therewith, (b) the incidence of strikes, (c) their duration or (d) the timing,

[1] A person laid off must wait basically one week before applying for benefits. A striker waits eight weeks.



nature and costs of collective bargaining settlements; and (2) has federal law preempted this field, requiring the state enactment to give way to federal policy.

Plaintiffs here, Telco, Western Electric Company (Weco), American Telephone & Telegraph Company Long Lines Department (Long Lines), and Empire City Subway Company (Limited) (Empire), are all part of the overall Bell System. Ninety per cent of the Bell System's non-management employees are members of unions, and seventy per cent are represented by the Communications Workers of America (CWA). For many years, the agreed-upon collective bargaining format between the union and the members of the Bell System was to select two Bell System companies with early contract expiration dates as the pattern-setters, one of them being an operating company with a bargaining unit of limited geographic scope, and the other being a bargaining unit with nationwide scope. National issues were the subject of bargaining in these pattern-setting negotiations, while local issues were to be negotiated separately with each unit. Once a pattern-making settlement was reached on a national basis, it became the standard for the settlement of national issues in all the other companies. Bargaining of local issues could then be concluded and complete contracts would be obtained.

In 1971, the pattern-setters chosen by CWA were Weco, as the nationwide bargaining unit, and the Chesapeake & Potomac Telephone Company, a multi-state bargaining unit of limited geographical scope. On April 30, 1971, the contracts with the two pattern-setters were due to expire. No agreement having been reached, the two contracts were

thereafter mutually extended on a day-to-day basis to July 14, 1971, as were other contracts with the Bell System that expired between April 30th and July 14th. On July 14, CWA began a nationwide strike against the Bell [813]
System involving some 500,000 employees, some whose contracts had expired, and some whose contracts, such as employees of Telco, Empire and Long Lines, had not yet expired. Four days later, agreements were reached among Bell System companies, including plaintiffs and CWA. These agreements covered both national and local items, the national items conforming to the national pattern. As soon as the agreements were reached, CWA called an end to the strike and directed a return to work on July 21st. With the single exception of the New York State bargaining units, the CWA-represented employees complied with this direction. However, approximately 38,000 members of the Telco unit continued on strike. Weco and Long Lines employees in New York State similarly stayed off the job. A ratification vote was scheduled and counting of the ballots was set for August 14th. CWA strongly endorsed ratification, and this was joined in by one Morton Bahr who, before, during and after the strike, was the top New York State CWA official. The results of the August 14th voting were that every CWA bargaining unit ratified the contract with the exception of the New York State units for Telco and Empire, and the strike was continued in New York.[2]

[2] Rhode Island (the only other state whose unemployment insurance statute parallels New York's law) employees represented by CWA were but a small part of two bargaining units within the



At the beginning of the strike, Telco made a decision not to settle, despite the prospect of a long strike, because the company had made an offer which had been approved and recommended by the international union, and which was in line with the pattern settlements ratified by the CWA membership throughout the rest of the country. Telco felt that the New York employees' tactics—endeavoring to break the pattern—could only lead to labor turmoil throughout the Bell System. After a number of months had passed, however, Telco saw that the strike would not end without some concession to union demands and, noting that employees were still eligible for six or more months of unemployment compensation, decided to settle along the lines recommended by the federal mediator. In addition to the fact that unemployment insurance payments would continue, there was pressure from the business community to restore normal operations and make backlogged installations of new equipment. Telco's New York unemployment insurance account was approaching a negative balance, having dropped from a pre-strike credit of more than $40,000,000. Finally, some businesses, in addition to complaining about lack of service, would have had to share in the cost of paying strike benefits if Telco's unemployment insurance fund went into negative balance. These factors caused Telco to submit to a break in the national pattern.[3]

New England Bell Telephone Company and, if they voted to reject their contracts, were obviously outvoted by the remainder of the employees in each of those two units who were employed in states which did not pay unemployment insurance benefits to strikers.

[3] Notwithstanding the break in the pattern (and, I note, the enormous cost to all parties and the public as well), CWA officer

During the seven months of the strike, the striking workers, after their wait of eight weeks, had received $49,000,000 in unemployment compensation benefits which were charged against Telco. Telco's unemployment compensation fund had been depleted by $40,000,000, which it was required to replace.[4] I note that the strike was thereafter declared illegal by the National Labor Relations Board.[5]

Notwithstanding the State's adamant position to the contrary, I regard it as a fundamental truism that the avail-

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ability to, or expectation or receipt of a substantial weekly tax-free payment of money[6] by, a striker is a substantial factor affecting his willingness to go on strike or, once on strike, to remain on strike, in the pursuit of desired goals.[7] This being a truism, one therefore would expect to find confirmation of it everywhere. One does.

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Morton Bahr, writing after the strike, obviously had mixed feelings about the outcome, for he stated:

> "The amount of additional wage benefits is anything but impressive. However, it broke the [Bell] System's long standing policy . . . . So, while the amount of money was small, the accomplishment and impact on the future is significant."

[4] It was assessed and had paid $6,000,000 in 1974 and $9,000,000 in 1975.

[5] 208 N.L.R.B. 267 (1973).

[6] The average here was $75.00; the highest $95.00.

[7] I note that even as to welfare payments, for which one on strike must make a showing of "need," Justice Blackmun, in *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed. 2d 1 (1974) stated:

> "It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract." *Id.* at 124, 94 S.Ct. at 1699.



Turning first to the union's contemporaneous view of the effect unemployment insurance had upon its ability to maintain this strike, particularly appropriate is a letter written by Morton Bahr, Vice President of CWA charged with administering all the union's affairs in New York, New Jersey and New England. He wrote to the New York CWA employees shortly after the strike was over:

> "The fact that more than 80% of the membership stood together for 218 days is simply incredible. In my judgment, it is a testimonial to three phenomena:
>
> 1. Dedication and support by the strikers
> 2. Unemployment insurance
> 3. Effectiveness of CWA's defense fund."[8]

During the course of the strike, the following appeared in the *New York Generator,* a CWA newspaper:

> "In an attempt to undermine any future strike effort, New York Telephone has filed a suit in Manhattan Federal Court to prevent strikers from collecting unemployment benefits.
>
> • • • • •
>
> "New York Tel. would do well to pay the [unemployment insurance] fund what it owes and commence preparation for our next contract, and incidentally, better wages and benefits, instead of looking for ways to sabotage our strike weapon even before we utilize it."

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[8] Mr. Bahr testified before me some four years after writing this letter that it had other than its plain meaning. I reject that self-serving explanation made at the trial.

In November 1971, during the course of the strike, Bahr wrote a letter to the local president in which he declared:

> "The strike against the New York Telephone Company enters the 18th week today. The stamina and spirit of our members in New York Tel and those respecting picket lines in Western Electric and Long Lines, is simply amazing. More than 89% of the New York Plant employees are still on the bricks.
>
> "*New York State Unemployment Compensation is a tremendous assist to our members.* In addition, the CWA Defense Fund is taking care of the necessary payments for shelter and installment payments for cars and appliances where repossession is threatened." [Emphasis supplied.]

In December 1971, CWA Local 1102 in a recorded telephone message issued a threat to a legislator who proposed repeal of the law granting unemployment insurance to strikers. The message, as monitored, read in part as follows:

> "According to the Staten Island Advance on Friday, December 3rd, our councilman Frank Deondelulo introduced a resolution which asks the State Legislature to repeal the law enabling strikers to obtain unemployment insurance. This ex-dentist who finds he has all the qualifications for public office is certainly alienating labor and will find this out when he tries for reelection."

At the outset of the strike, CWA expended monies from its own defense fund but shortly thereafter stated:



> "No food assistance is to be given after September 7, 1971 since the members will have other income—
>
> [815]
>
> which will average $75.00 per week from the New York State Unemployment Compensation."

Following the strike, in April 1973, in a recorded telephone message to its members, CWA Local 1103 in Westchester urged them to write to a local state legislator, saying:

> "If we did not get [unemployment insurance] aid during the big strike of 1971 and 1972, I don't know where we would be right now."

Nor is there any question that CWA has always regarded money, regardless of source, as essential to success in a strike. In stating why it had established its defense fund, CWA stated in its Report of the Defense Fund Committee in 1952:

> "It was recognized that, regardless of every other consideration, the Union could not hope to survive unhurt in time of stress without an adequate defense fund.
>
> "The experience of every union that has ever joined battle with its bargaining adversary in a show of economic strength proves that a war chest, under one name or another, is an absolute must.
>
> • • • • •
>
> "The Defense Fund is a tool. It is one of the bargaining tools, similar to such a bargaining tool as statistics which are gathered by the Research Department, and it cannot do a job unless it is held in the proper hands."

CWA further enunciated this view of the importance of money in a strike in an issue of CWA News just before the strike in this case. The article, "Strike Survival," posed the question, "How do you survive a strike when the money stops coming in and the bills continue to mount and you still have to feed and clothe the children?"

While I need not place weight upon the following in reaching my conclusion, it is appropriate to note further support for the truth of the premise in union comment in other strike situations. In the Rochester Telephone Company strike in 1974-1975, CWA Local 1170 exhorted its members by way of a recorded telephone message as follows:

> "[T]he members of Local 1170, C.W.A., will march ten feet tall right through the holiday season and into unemployment insurance."

In a 1960 strike involving the United Steelworkers of America, the union answered strikers' questions concerning when they could "start drawing unemployment insurance" by advertising in a Syracuse newspaper that "in just 18 days, you will all be eligible for unemployment insurance."

In an International Union of Electrical Workers meeting in Cleveland, Ohio, at the taking of a vote to end a nationwide strike involving General Electric, the union official chairing the meeting stated as follows:[9]

> "All I know is that Schenectady [New York] voted today 5 to 3 to stay out and you know the reason why.
>
> • • • • •

[9] The evidence of this was a motion picture film received and exhibited on the trial.



> "Because they're getting $65 a week in unemployment compensation."

During the same General Electric strike, the following appeared in December 1969 in a Schenectady newspaper:

> "WORKERS FOREGO STRIKE BENEFITS
>
> "SCHENECTADY (UPI)—Members of one of the largest union locals in the General Electric Co. strike voted Monday to transfer their strike benefits to workers in other states while they collect New York unemployment checks, according to union officials.
>
> "Joseph Mangino, business agent for the 12,500 members of Local 301, International Union of Electric Workers, said the 'solidarity' vote came at an 'overflow' local meeting as the GE strike entered its eighth week.
>
> "Because the strikers in New York State are now eligible for state unemployment payments, Mangino said, they voted to send the $12 weekly per man in union strike benefits to strikers in other states who do not receive [816] unemployment checks."

Looking further, one continues to discover facts in conformity with the premised truism. Plaintiffs, following the suggestions in *Grinnell Corp.* v. *Hackett*, 475 F.2d 449 (1st Cir.), *cert. denied*, 414 U.S. 858, 879, 94 S.Ct. 59, 164, 38 L.Ed.2d 108, 124 (1973), engaged Dr. Gerald J. Glasser to do an attitudinal survey.[10] Dr. Glasser, experienced in his field, testified that:

[10] *Grinnell* suggests that:

> "[A] . . . representative and sophisticated sampling of experience and attitude directed at the effect of the actual or ex-

> "[A]ttitudes reflect prospective behavior of individuals . . . .
>
> "[T]he attitudes of a group of individuals, like employees, is of some interest and concern to other people, in this particular case, management and labor leaders. So it is important to know attitudes and opinions here for their impact on third parties . . . ."

Dr. Glasser's attitudinal survey, professionally done, was indeed helpful. It was based on random digit dialing and covered 600 union members and 600 non-union members. The results showed a predominant feeling among both union and non-union workers that because of unemployment insurance in New York State unions can achieve better strike settlements, since unemployment insurance enables strikers to hold out longer. Less predominant, but still shared by one-half of the union and non-union workers who expressed an opinion, was the strong belief that unemployment insurance forced management to settle more quickly. A majority of the union members surveyed ranked unemployment compensation as the first resource they would turn to in a strike, above welfare, food stamps and their union's own strike funds.

Plaintiffs, in further accordance with *Grinnell*,[11] proffered Dr. Lewis J. Perl, who had done a statistical com-

pected receipt of delayed unemployment benefits might be helpful to a court seeking to decide the relevant question of infringement." 475 F.2d at 459.

[11] *Grinnell* called for:

"... statistical comparisons of the length and cost of strikes in states granting unemployment benefits (Rhode Island and New York) and the length and cost of strikes of similar size



parison using the United States Bureau of Labor Statistics figures for the ten year period from 1965 through 1974 to test the hypothesis that the payment of unemployment compensation to strikers influences the collective bargaining process by increasing the *number* of strikes settled within eight weeks and the *duration* of strikes that continued beyond that period. Dr. Perl's hypothesis was grounded in the belief that compensation influences both parties to the collective bargaining process but in opposite directions. In his view, payment of benefits reduces the cost to workers of strikes lasting more than eight weeks, with the consequence that they are somewhat more aggressive than they would be in their demands and able to tolerate a longer strike. On the other hand, Dr. Perl hypothesized that the payment of these benefits increases the cost to employers when a strike goes beyond the eight week period, not only because of the increased cost of the unemployment insurance taxes themselves, but also because the employer is likely to anticipate an increase in the resistivity of his employees and therefore conclude that if the strike does last more than eight weeks, then he will either have to tolerate a very long strike or settle on terms less favorable to himself than originally contemplated. Thus, an employer would be less willing to see a strike occur in the first place, would

in similar industries in other states not granting such benefits. . . . Their weight would depend on the extent to which they considered and controlled for other factors potentially responsible for any disparities—such as the size and nature of the industry, the length and strength of union representation, past labor-management relations and prior strike history, the relative wage and benefit structure under the expiring agreement, and local cost-of-living or other economic or structural peculiarities." 475 F.2d at 459.

be particularly anxious to prevent a strike from lasting more than eight weeks, and might increase settlement offers to avoid either possibility. In sum, therefore, Perl hypothe- [817] sized that one might expect the statistics to show an increase in New York in the proportion of strikes settled in the initial eight week period, on the one hand, and an increase in the duration of strikes lasting longer than that on the other. Perl's hypothesis was indeed supported.

Perl's analysis of the Department of Labor statistics reveals that strikes of more than eight weeks last two to four weeks longer in New York State than in states other than New York and Rhode Island,[12] while a greater percentage of strikes are settled in eight weeks or less in New York than in states other than New York and Rhode Island. Applying the settlement rate for the rest of the country to New York State, Perl concluded that 933,000 fewer man-days would be lost in New York each year were the national settlement rate to prevail here, which would constitute a 15% reduction in man-days lost due to strikes in New York.

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[12] In order to utilize the statistics effectively, Perl lumped New York and Rhode Island—the two states having essentially identical statutes—together. The data for Rhode Island showed no statistically significant differences from the data elsewhere, but the small number of observations available from the Rhode Island data made it impossible to draw any conclusions therefrom with any confidence. In addition, it is clear that where regional or nationwide strikes are involved, any determination as to Rhode Island is frequently made by the larger part of the bargaining unit that is in other states (see *supra* note 2) and, in any event, Rhode Island's small population tends to diminish the statistical value of its own figures.



Finally, plaintiffs called Dr. Jules Backman, an acknowledged expert in the field of collective bargaining, to give an overview. Backman, too, saw the availability and payment of unemployment insurance benefits as affecting the duration of strikes in opposite directions. Under some circumstances, he felt, the awareness that the staying power of the union would be increased, while at the same time anticipating a rise in their unemployment insurance tax, would induce some employers to settle earlier, out of concern for what may happen after the eight week suspension period. Thus, he concluded, unemployment insurance could increase somewhat the incidence of earlier settlements. However, as the strike passed the eighth week, he saw the position becoming "dramatically one-sided," for (1) the employee comes into receipt of funds adequate or almost adequate to meet essential needs, thereby increasing staying power, (2) the union's willingness to make concessions is reduced because one of its duties, providing resources to meet the needs of strikers, has been met and will continue to be met for as much as a year, and (3) the employer, on the other hand, sees his striking employee being subsidized while he, the employer, is in effect financing the subsidy out of his unemployment insurance taxes.

The State called several expert witnesses in an endeavor to dispute the "truism." The essence of these witnesses' testimony was that (a) it is issues that are in dispute between the parties that cause strikes; unemployment compensation is not a factor in determining whether to strike or maintain a strike once it is underway; and (b) in any event, plaintiffs have not proved that it *was* a factor. Often, in the course of their testimony, however, they ended up

supporting plaintiffs' position.[13] To the extent their testi- [818]
mony was in real or apparent conflict, I reject it.

While immaterial to the conclusions reached herein, I deem it appropriate to comment on the claimed interest of the State of New York in paying unemployment insurance benefits to strikers, which proof was offered by the State. Dr. Herman Gray testified that he had been a member of the Legislative Advisory Committee in 1934-1935, assisting in drafting the State's Unemployment Insurance Law. He thereafter served as Chairman and as public member of

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[13] For example, Dr. Mason Haire testified:

"THE COURT: How would you assess that factor, Doctor?

"A. If management thinks the payment of unemployment insurance will enable the workers to hold out longer, how would I assess that factor? Is that the question?

"THE COURT: In their bargaining stance.

"THE WITNESS: If management is convinced that that is true, I think they might change their bargaining position. Whether or not it is true—I think it is characteristic of all of us, if we think something is true, we think there is a burglar under the bed."

Dr. James Kuhn testified:

"Q. [N]ow I want to ask you a question, Dr. Kuhn: If a union believes that strike power is enhanced by unemployment insurance, and so expresses itself, in your opinion, if they believe that, is unemployment insurance exerting some influence in the bargaining situation?

"A. I do not see how one can say, Mr. Benetar, unless you know the influence of other factors, because this psychological factor may be offset by others.

"Q. I didn't ask you to weight the factors. I understand there is more than one factor in bargaining.

"THE COURT: Well, I think Dr. Kuhn has said yes, it's a question of what happens to that factor, that is all he's saying. He says yes, it is a factor. All right."



the State's Unemployment Insurance Advisory Committee. His professional activities over the years were mainly in the capacity of teacher, arbitrator and lawyer. It was his testimony that while the drafters of the law were principally concerned with "involuntary unemployment, and a man who is on strike cannot be said to be involuntarily unemployed," there were other concerns as well. One was with the ability of future administrators, at that time (1935) viewed as being too unschooled in the complexity of labor disputes, to determine whether a labor dispute involved a strike or lockout or whether a particular claimant was a striker, locked-out employee, sympathy striker refusing to cross a picket line, or otherwise affected by the dispute.[14] The result of this concern for efficiency in administration was a compromise under which all employees who became so unemployed were to be lumped together and treated alike and all such claimants were to serve an identical (10 weeks) waiting period and thereafter all were to receive full benefits. Thus, the avowed purpose of the New York Labor Law[15] was subverted for the purpose of mere administrative convenience. Dr. Gray regretted this result later when, as the Chairman of the New York State Unem-

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[14] It was also felt at that time that this would be an insignificant problem.

[15] § 501 provides in pertinent part:

". . . the legislature therefore declares that in its considered judgment the public good and the well-being of the wage earners of this state require the enactment of this measure for the compulsory setting aside of financial reserves *for the benefit of persons unemployed through no fault of their own.*" (Emphasis supplied).

ployment Advisory Committee, he wrote in 1946, recommending that benefits *not* be paid to strikers, as follows:[16]

> "The present provision of the law which permits the workers who voluntarily become unemployed because of a strike to receive benefits during the pendency of the strike runs counter to the objective of the law which 'compels our setting aside of financial reserves for the benefit of persons unemployed through no fault of their own.'"

Gray concluded his testimony before me with the concession that in his judgment unemployment insurance does have an impact on strikes.

> "Q. . . . 'Unemployment insurance benefits as such [Gray had written in 1946] should not be used as an instrument for either party involved in a labor dispute.'
>
> "A. Right. You show me how to avoid it. If I knew a way of avoiding it, I would have proposed it a long time ago."

The other witness called by the State on this subject was Unemployment Insurance Director Harold Kasper, currently Director of New York State Unemployment Insurance Division. Kasper contended that in his opinion the State maintained a neutral position for somewhere between 8 and 11 weeks (depending upon the length of administrative delay in commencement of benefits), saying:

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[16] Gray noted $2.5 million in benefits paid to 51,000 strikers in 1946 alone.



> "The State has assumed a neutrality for eight weeks and stood aside, so to speak, hands off, because it has been our experience that most strikes have been settled in that time."

[819]

Thereafter, Kasper testified, the State intervenes to aid strikers[17] through benefit payments chargeable against their struck employer. Kasper noted that as for the law's requirement that the striker seek other employment for entitlement of benefits, he conceded that little effort is made by the State to enforce this requirement, stating that, in his opinion, part of the objective of the law is to keep an employer's labor force intact during a strike.

Kasper's testimony concerning the actual operation of the law confirmed the conclusion that, certainly today, it is administrative *convenience* and not administrative *inability* that is being offered here by defendants as a justification for the New York approach. Kasper testified in detail on the elaborate quasi-judicial hearing procedure, established and operating under the New York law, which provides for hearings before full-time impartial referees (all of whom are attorneys) in which claimants may be represented by counsel and witnesses are examined and cross-examined under oath. A verbatim stenographic record is produced, briefs may be submitted and appeals as of right may be

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[17] "Q. . . . an objective of the statute is to aid strikers to pay their essential expenses when the strike exceeds eight weeks?
"A. Yes . . . .
"Q. You say that one of the objectives was to maintain a labor force for employers, is that right?
"A. That is correct."

taken, first to a five member Appeal Board and thereafter to the state courts. As noted by Kasper, Unemployment Insurance Referees are sometimes called upon to resolve subtle and hotly contested questions of fact (e.g., whether an employee has been discharged because of his race). Moreover, administrative *ability* does exist, for 48 states have statutes, some in being as long as New York's, under which determinations as to type of labor dispute and/or status of the claimant are regularly made, as Dr. Gray, one of the New York statute drafters, now recognizes.

Being confirmed in my judgment that unemployment compensation *does* have an impact on strikes, and concluding that the State's interest in its payment is not of such consequence as to be a factor in the Court's determination here, I turn to what I regard as the only issue before me at this time—that is, whether the New York State Labor Law, to the extent it provides for payment of unemployment compensation to strikers, is in conflict, directly or indirectly, with the policy of free collective bargaining established in the federal labor laws and is therefore invalid under the supremacy clause of the United States Constitution.[18]

The principle of labor law preemption "was born of [the Supreme] Court's efforts, without the aid of explicit congressional guidance, to delimit state and federal judicial authority over labor disputes . . . ." *Amalgamated Association of Street Employees* v. *Lockridge,* 403 U.S. 274, 286, 91 S.Ct. 1909, 1918, 29 L.Ed.2d 473 (1971). Congress has

[18] U.S.Const. art. VI, cl. 2, provides: "the Laws of the United States . . . shall be the supreme Law of the Land; . . . any Thing in the . . . Laws of any State to the Contrary notwithstanding."



regulated and occupied the area of labor relations "to the full extent of its constitutional power under the Commerce Clause." *Amalgamated Association of Street Employees* v. *Wisconsin Employment Relations Board,* 340 U.S. 383, 391, 71 S.Ct. 359, 363, 95 L.Ed. 364 (1951). The primary factor which led Congress to enact

> "a comprehensive national labor law . . . was the perceived incapacity of commonlaw courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring *the balance of power among competing forces* so as to further the common good." *Lockridge,* 403 U.S. at 286, 91 S.Ct. at 1917-1918 (emphasis supplied).

This view has been most recently reaffirmed in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975); *accord, Old Do-*

[820]

*minion Branch No. 496, National Association of Letter Carriers* v. *Austin,* 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); *Beasley* v. *Food Fair, Inc.,* 416 U.S. 653, 94 S.Ct. 2023, 40 L.Ed.2d 443 (1974).

Free collective bargaining, under federal labor policy, is premised on the concept of government non-interference and neutrality. While the government "acts to oversee and referee the process of collective bargaining," it leaves "the results of the contest to the bargaining strengths of the parties." *H. K. Porter Co.* v. *NLRB,* 397 U.S. 99, 108, 90 S.Ct. 821, 826, 25 L.Ed.2d 146 (1970). The right to bargain

collectively clearly contemplates economic warfare and "does not entail any 'right' to insist on one's position free from economic disadvantage." *American Ship Building Co.* v. *NLRB,* 380 U.S. 300, 309, 85 S.Ct. 955, 962, 13 L.Ed.2d 855 (1965). As a practical matter, the use or availability of economic force was intended to be a factor in reaching agreement in collective bargaining. In *NLRB* v. *Insurance Agents' International Union,* 361 U.S. 477, 489, 80 S.Ct. 419, 427, 4 L.Ed.2d 454 (1960), the Court stated:

> "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons . . . to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side. One writer recognizes this by describing economic force as 'a prime motive power for agreements in free collective bargaining.'" (Citations omitted).

This position was reiterated in *NLRB* v. *Burns International Security Services, Inc.,* 406 U.S. 272, 288, 92 S.Ct. 1571, 1582, 32 L.Ed.2d 61 (1972), where the Court stated that:



> "The congressional policy manifest in the Act [NLRA] is . . . to allow the balance of bargaining advantage to be set by economic power realities."

In *Teamsters Local 20* v. *Morton,* 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964), the Court, in passing upon Ohio common law governing secondary pressures during a labor dispute, an area not specifically covered by federal enactment, also held the field to be preempted.[19]

The clear teaching of the foregoing is that any state activity that "creates a substantial risk of conflict with policies central to federal labor law" is preempted and barred.[20] The New York Unemployment Insurance Law, as applicable to strikers, is just such state activity.

Supportive of this conclusion are reported decisions involving attacks on other state enactments providing for unemployment compensation payments to strikers. In *Grinnell Corp.* v. *Hackett,* 475 F.2d 449 (1st Cir. 1973), *cert. denied,* 414 U.S. 858, 879, 94 S.Ct. 59, 164, 38 L.Ed.2d 108, 124 (1973), the court reversed the dismissal of the

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[19] "If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe . . . the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. 'For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.'" *Morton,* 377 U.S. at 259-60, 84 S.Ct. at 1258, *quoting Garner* v. *Teamsters Union,* 346 U.S. 485, 500, 74 S.Ct. 161, 98 L.Ed. 228 (1953).

[20] *Connell,* 421 U.S. at 636, 95 S.Ct. at 1841.

complaint which had alleged the unconstitutionality of Rhode Island's statute. In *Hawaiian Telephone Co.* v. [821] *Hawaii Dept. of Labor,* 405 F.Supp. 275 (D. Hawaii 1975), the court found federal preemption after a trial on the merits. In *Dow Chemical Co.* v. *Taylor,* 57 F.R.D. 105 (E.D. Mich. 1972), motion to dismiss the complaint was denied.

The State, in urging an absence of preemption, directs my attention to cases involving welfare payments to strikers and their families. Principal among these is *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974). However, the problems sought to be remedied by unemployment compensation and welfare, and therefore the state's interests, are not identical. As aptly expressed in *Grinnell,* 475 U.S. F.2d at 459-60:

> "Welfare payments, premised on a finding of need, are directed at alleviating real hardship—serious threats to the physical well-being, indeed in some cases, survival, of individuals. Unemployment benefits in contrast, are conditioned on a certain minimal amount of prior employment and earnings in a specified period . . . . The amount of assets on hand or the nature of individual or family need are irrelevant. The state interest would then appear to be . . . the avoidance of 'economic insecurity,' or put another way, insurance against the temporary disruption of a flow of income.
>
> "Indeed, as to unemployment compensation for strikers, the state interest would appear somewhat narrower."



Given the foregoing observations, the welfare cases are clearly distinguishable.[21]

Both the State and the plaintiffs direct my attention to the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.,* but obviously for different reasons. The Railroad Unemployment Insurance Act grants benefits to strikers unless the Railroad Retirement Board finds that the strike was commenced in violation of the Railway Labor Act or of the established rules and practices of a bona fide labor organization, of which the striker is a member. From this, the State urges that obviously Congress recognizes that the *prospect* of unemployment compensation is not a factor in collective bargaining and, by analogy, the same Congressional attitude should be applied to the claimed conflict between the NLRA and New York Unemployment Insurance provisions. The plaintiffs, on the other hand, urge the conclusion that when Congress intended to permit compensation to strikers, it specifically provided for it and did so only in a unique situation[22] where elaborate statutory machinery provides for substantial government intervention in the *entire* strike process, including mediation, arbitration and the confirmation of emergency boards, rather than the free collective

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[21] I note that whereas *Grinnell* suggests that the court should engage in a balancing of federal and state interests, the court in *Hawaiian Telephone Co.* rejected a balancing test, stating that the court's duty was merely to inquire as to whether there was a conflict between the statutes. I conclude I need not reach the question of whether a balancing test is required. However, even if such a test were required, I would hold the federal interest superior to the state interest herein, which is at best one of administrative convenience.

[22] Obviously, a major railroad strike can have a far greater effect on the nation's economic health than any industrial strike, no matter how large.

bargaining envisioned by the NLRA. Unemployment benefits are therefore paid to striking railway employees only after following *all* of the mandated procedures. Otherwise, no benefits are paid (45 U.S.C. § 354). Given the clear teaching of numerous authorities such as *Teamsters Local 20* v. *Morton, supra,* I do not draw the conclusion from the unique railroad field that the State urges, and find the analogy inapplicable.

Subsequent to the taking of testimony herein, the United States Supreme Court, in a summary disposition, dismissed the appeal in *Kimbell, Inc.* v. *Employment Security Commission,* 429 U.S. 804, 97 S.Ct. 36, 50 L.Ed.2d 64 (1976), "for want of a substantial federal question." *Kimbell* involved post-strike payment of unemployment compensation to strikers in certain cases. The State urges that this ruling is not limited to the New Mexico statutory provisions, but is applicable to *any* state statute which authorizes payment [822] of compensation to strikers. *Kimbell,* it is urged, has determined that such payments are not prohibited as being in conflict with federal labor policy. If the State is correct in this view, *Kimbell* is dispositive of this case.

The New Mexico statute at issue in *Kimbell* provides for the granting of unemployment benefits to strikers only in extremely limited and unusual circumstances which are determined after the strike is terminated,[23] N.M. Unemployment Compensation Law of 1936, § 59-9-5(d), N.M.Stat. Ann. (Supp.1975). The striker-claimants in *Kimbell,* subsequent to the strike, applied for and received unemployment compensation from the New Mexico Employment Security Commission. An appeal was taken to the New Mexico District Court for the Second Judicial District, which entered an order denying the payment of unemployment compensation. The district court concluded that the claimants had been involved in a labor dispute at their last place of employment and that a "stoppage of work," which would disqualify them from benefits under New Mexico's statutory scheme, had occurred as a result of labor dispute. The court also found that:

> "Under the facts of this case payment of unemployment compensation benefits to the claimants herein would interfere with the national policy of Federal Labor Law of encouraging self organization and collective bargaining without state interference in the use of economic weapons available to both labor and management, including the policies enunciated in 29 U.S.C. §§ 157-158, on contravention of the Supremacy Clause of Article VI of the Constitution of the United States." *Kimbell, Inc.* v. *Employment Security Commission of the State of New Mexico,* Consolidated Case No. 6-73-08568, p. 9 of Findings of Fact and Conclusions of Law (N.M.Dist. Ct., Second Dist., filed October 11, 1974).

The New Mexico Supreme Court, in an unreported decision, summarily reversed the lower court on the basis of its decision in *Albuquerque-Phoenix Express, Inc.* v. *Employment Security Commission,* 88 N.M. 596, 544 P.2d 1161

[23] It is substantially different, both on its face, and in its operation, from New York's law which grants benefits to all strikers during the strike after a fixed waiting period.

(1975). *Kimbell, Inc.* v. *Employment Security Commission of New Mexico,* No. 10323 (N.M.Sup.Ct. Dec. 29, 1975).

*Albuquerque* had upheld the grant of unemployment compensation to strikers after finding that the claimants were available for and were actively seeking work as required by § 59-9-4(a)(3), N.M.Stat.Ann. 1953 Comp.; that they had not left work voluntarily within the meaning of § 59-9-5(a), N.M.Stat.Ann.1953 Comp. and that there was no "stoppage of work" at the company's premises which would disqualify them under § 59-9-5(d), N.M.Stat.Ann.1953 Comp.

On further appeal, the Supreme Court dismissed in a summary disposition as follows:

> "The appeal is dismissed for want of a substantial federal question. Mr. Justice Brennan, Mr. Justice Blackmun and Mr. Justice Stevens would note probable jurisdiction and set the case for oral argument."

Clearly, this is a determination on the merits of the case, *Hicks* v. *Miranda,* 422 U.S. 332, 344, 95 S.Ct. 2281, 45 L. Ed.2d 223 (1975). A federal district court, however, must now determine "what issues had been properly presented . . . and declared by [the Supreme Court] to be without substance." *Id.* at 345 n.14, 95 S.Ct. at 2290. Two courts have already expressed their views in this regard and reached opposite conclusions. The court in *Dow Chemical Co.* v. *Taylor,* 428 F.Supp. 86 (E.D.Mich. 1977), held that the summary dismissal in *Kimbell* did *not* foreclose it from considering the Michigan compensation statute on the merits. The Third Circuit ruled to the contrary in *Super Tire Engineering Co.* v. *McCorkle,* 550 F.2d 903 (3rd Cir. 1977), stating:



> "We can only conclude that, when the Supreme Court [823]
> dismissed for want of a substantial federal question in *Kimbell,* the necessary predicate for that dismissal was a determination that federal labor policy did not preclude the payment of unemployment compensation to strikers. That determination controls the labor policy aspect of this case."

On independent and careful consideration of the record and numerous briefs before the Supreme Court in *Kimbell,* I am compelled to conclude that the Court merely determined that the New Mexico compensation provisions, as a matter of *fact,* do not come into conflict with Federal labor law policy. I note that while the lower court in New Mexico found federal preemption, the reversal by the New Mexico Supreme Court was a summary reversal citing its prior decision, *Albuquerque-Phoenix Express,* which dealt entirely with state issues—construction of the relevant New Mexico statutes. I further note that the Attorney General of New Mexico moved to dismiss the appeal in the Supreme Court on the ground that the question presented to the Court "does not raise a substantial federal question of preemption sufficient for this Court to take jurisdiction." New Mexico's brief in support of that proposition is illuminating:

> ". . . the New Mexico law, like a majority of the States' laws, does not provide for payment of benefits to strikers after a fixed period of disqualification. The general rule under New Mexico law is that claimants are

disqualified from receipt of benefits for the duration of their unemployment resulting from a labor dispute which causes a substantial stoppage of work at their place of employment. As indicated in the record, the Employment Security Commission of New Mexico has allowed payment of unemployment compensation benefits to strikers in only three cases in its history, including the two cases discussed in this appeal, and only under facts similar to those present in this case where there has been no appreciable impact from the strike on the employers' continued business operations. In contrast to the Rhode Island law, the interpretation by the New Mexico Supreme Court of the New Mexico unemployment compensation statutes provides no fixed or definite policy of payment of benefits to strikers, nor allows any expectations of such payment upon which employees could reasonably predicate labor dispute strategy. In fact, the interpretation by the New Mexico Supreme Court as to when benefit payments to strikers might be authorized runs directly counter to the employees strike objectives which is to impose as substantial an impact on the employers' business operations as possible to increase his economic burden and persuade him to a satisfactory settlement. To the extent this avowed strike strategy is realized, the eligibility of striking employees for benefits is defeated.

"It is apparent, therefore, that neither the statistical history of payment of benefits to strikers nor the inconsistency between strike objectives and eligibility for benefits is likely to make the administration of the New



Mexico unemployment compensation law a factor in labor dispute negotiations or to interfere with federal labor policy. The case on appeal here as well as the *Albuquerque-Phoenix Express* case illustrates this point. In neither case did the Employment Security Commission ever reach a decision on the eligibility of the claimants for benefits until after the labor dispute was settled between the parties and a new contract agreement signed."

Obviously, the factual and legal position of the Attorney General of New Mexico would be a sound and compelling basis for the Supreme Court's summary dismissal on the merits. I find this to be the basis for the ruling and conclude that *Kimbell* is at the very least inapplicable and does not preclude me from reaching the issues in this case on the merits.

One point alone remains for discussion. The State contends that under the eleventh amendment to the United [824]

States Constitution[24] it is immune from suit because the damage award here sought would be payable to a private party from the State treasury. The State's position is, however, factually not supported, for the Unemployment Insurance Fund, although established pursuant to statute, exists separate and apart from the State's general funds

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[24] U.S.Const. amend. XI provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

and treasury, *New York Labor Law* §§ 550, 553. It is a pooled fund, consisting entirely of unemployment insurance contributions by employers and some federal funds. It receives *no* State funds of any kind, and is used solely to pay benefits. Indeed, the State has expressly shielded its treasury from any obligations arising out of the payment of unemployment insurance benefits and/or the administration and operation of the fund. §§ 553, 554. This being so, the State's contention is, in my opinion, without merit. See *Bowen* v. *Hackett*, 387 F.Supp. 1212 (D.R.I.1975); cf. *Fitzpatrick* v. *Bitzer*, 519 F.2d 559 (2d Cir. 1975).

On the basis of the foregoing, the New York Labor Law, to the extent it provides for the payment of unemployment compensation to strikers is state intervention on behalf of the strikers, causes an employer to finance its own strikers, is in conflict with federal labor law policy and is therefore unconstitutional and void under the supremacy clause of the United States Constitution.

The foregoing constitute my findings of fact and conclusions of law.

The parties are to appear before me on June 1, 1977, at 3:00 P.M., to discuss interim relief to the extent appropriate, and to schedule further steps herein.

So Ordered.



**Memorandum and Order**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4557

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NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Plaintiffs,*

—against—

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and MARIO A. PROCCACINO, State Commissioner of Taxation and Finance,

*Defendants.*

---

OWEN, *District Judge.*

For the reasons expressed in *Grinnell Corp.* v. *Hackett*, 475 F.2d 449 (1st Cir. 1973), *Hawaiian Telephone Co.* v. *Hawaii Dep't of Labor and Indus. Relations*, 378 F. Supp. 791 (D.Haw. 1974) and *Dow Chemical Co.* v. *Taylor*, 57 F.R.D. 105 (E.D. Mich. 1972), defendants' motion for summary judgment pursuant to Fed. R. Civ. P., Rule 56 dismissing plaintiff's first four causes of action alleging that N.Y. Unemployment Compensation Law §592.1 violates the supremacy clause of the U.S. Const. Article VI, by unlawful

intrusion into an area preempted by the federal labor laws, is denied. Defendants' bare statistics to the effect that the percentage of idleness resulting from work stoppages and the mean duration of work stoppages is no higher in states which pay unemployment insurance benefits to strikers than in states which do not, do not alone prove that the grant of unemployment benefits to strikers has no significant impact upon the policy of free collective bargaining embedded in the federal labor laws. They only provide some primary evidence on which to "*start* analysis". *Grinnell Corp.* v. *Hackett,* 475 F.2d at 459 (emphasis added).*

The defendants' position on the issue of damages raises difficult questions on the scope of the doctrine of sovereign immunity in the light of *Edelman* v. *Jordan,* 415 U.S. 651 (1974); see *Bowen* v. *Hackett,* —— F.Supp. —— (D.R.I. Civil Action Nos. 5038 and 5041, Jan. 16, 1975). However, these questions need only be reached should plaintiff demonstrate at trial that §592.1 violates the Supremacy Clause or the Fourteenth Amendment of the Constitution.

Consequently, I defer ruling thereon until that time.

So Ordered:

Richard Owen
*United States District Judge*

March 26, 1975.

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* While I have substantial doubt that §592.1 is so irrational as to be violative of the Fourteenth Amendment equal protection and due process clauses as is alleged in the fifth and sixth causes of action in the complaint, I prefer to withhold decision on defendants' motion for summary judgment in its favor on these causes of action until the full record is developed at trial.

Supreme Court, U. S.
FILED
JAN 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-961**

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

*v.*

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE.

*Respondents.*

## BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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IN THE

# Supreme Court of the United States

OCTOBER TERM—1977

**No. 77-961**

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

*v.*

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE.

*Respondents.*

## BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

This brief *amicus curiae* in support of the petition of New York Telephone Company, Western Electric Company, American Telephone & Telegraph Company, Long Lines Department, and Empire City Subway Company (Limited), is filed by the Chamber of Commerce of the United States, with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

## Interest of the *Amicus Curiae*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce, and trade and professional associations, and a direct business membership in excess of 65,000. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests, before the courts, the U. S. Congress, the Executive Branch and independent regulatory agencies of the Federal Government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[1]

The questions presented in the instant case are of vital concern to the Chamber and its members. Essentially, the case presents the question whether states may in-

[1] E.g., *Buffalo Forge* v. *Steelworkers*, 428 U.S. 397 (1976); *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union 100*, 421 U.S. 616 (1975); *Gateway Coal Company* v. *United Mine Workers of America, et al.*, 414 U.S. 268 (1974); *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville, etc., et al.*, 417 U.S. 12 (1974); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkel, et al.*, 416 U.S. 115 (1974); *N.L.R.B.* v. *Bell Aerospace Company Division of Textron Inc.*, 416 U.S. 267 (1974); *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B.* v. *Granite State Joint Board*, 490 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 517 (1971); *N.L.R.B.* v. *The Boeing Company, et al.*, 91 S.Ct. 1952 (1973).



trude upon the national labor policy of government neutrality in labor disputes and the process of collective bargaining, by granting unemployment compensation benefits to strikers at the expense of their struck employer. Inherent in that question is the broader issue of whether, under the Supremacy Clause of the United States Constitution and the doctrine of pre-emption, as enunciated by this Court, states may compel an employer to financially assist a strike by his own employees, and thus tip the delicate economic balance so essential to effective collective bargaining and the resolution of labor disputes. Moreover, Chamber members contribute a very significant portion of the monies which constitute the Unemployment Insurance Funds of the various states. The Chamber, therefore, has a vital and continuing interest in the outcome of this litigation.

The Chamber's interest in the questions presented by the petition of New York Telephone Company is further evidenced by its intervention in *Grinnell Corporation* v. *Hackett*, 475 F.2d 449 (1st Cir., 1973), cert. den. 414 U.S. 858 (1973), and in *Hawaiian Telephone Company* v. *State of Hawaii, Dept. of Labor & Indus. Rel.*, 378 F. Supp. 791 (D. Hawaii, 1974), 405 F. Supp. 275 (D. Hawaii, 1975).[2] The decision of the Second Circuit in this case stands in direct conflict with that of the First Circuit in *Grinnell*, where the Court found that Congressional intent was ambiguous. Should that conflict per-

[2] Hawaiian Telephone Company, the Chamber of Commerce of the United States and the Chamber of Commerce of Hawaii have filed a joint petition concurrently with the petition in the instant case, requesting that a writ of certiorari issue in advance of the judgment of the Court of Appeals for the Ninth Circuit in *Hawaiian Telephone*, as the issues are essentially the same. (Docket No. 77-962). We are advised that Grinnell Corp. has sought a rehearing of this Court's previous denial of certiorari.

sist, unemployment compensation benefits to strikers could be an unconstitutional intrusion upon the federal labor policy in some states, but not in others. Thus, Chamber members and other employers would be compelled to support strikes by their employees in some states, but in other states, employers would be permitted the full play of economic forces Congress intended to allow in labor disputes.

Accordingly, the Chamber submits this brief *amicus curiae* in support of the petition for writ of certiorari filed by petitioners herein.

## *REASONS FOR GRANTING THE WRIT*

### I

**The Second Circuit decision creates a conflict between circuits and is contrary to congressional and judicial pronouncements prohibiting state action except where expressly permitted or consistent with the federal scheme.**

The decision of the Second Circuit in *New York Telephone Company, et al* v. *New York State Department of Labor, et al.*, —— F.2d —— (No. 77-7337, Nov. 9, 1977) 96 LRRM 2921, is in direct conflict with that of the First Circuit in *Grinnell Corporation, supra,* and Supreme Court decisions on labor law pre-emption. It completely ignores the former and violates the latter.

The Second Circuit held in *New York Telephone,* that the New York statute permitting payment of unemployment compensation to strikers after an eight-week period was a permissible, rather than pre-empted, exercise of state authority. It acknowledged a conflict between the



New York statute and "the broad federal policy of free collective bargaining", but said "the conflict is one which Congress has decided to tolerate.", 96 LRRM 2926. Earlier, the First Circuit in *Grinnell Corp.* v. *Hackett, supra,* examined the same ground, but found no clear evidence of Congressional intent on the subject. 475 F.2d 454, 457. The answer to the question of intent is, of course, dispositive of the pre-emption issue and thus determinative of whether states may burden the bargaining process by transferring dollars from the struck employer to his striking employees.

After a certain amount of judicial probing in earlier Supreme Court decisions, there developed a recognition by the Court of the several distinct branches of the pre-emption doctrine and the appropriate tests applicable to each. *Lodge 76, IAM* v. *Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976). If conduct is neither expressly prohibited nor protected by the National Labor Relations Act, 61 Stat. 136 et seq., 29 USC 151 et seq., the question is raised whether "Congress has occupied the field and closed it to State regulation". *Teamsters Local 20* v. *Morton,* 377 U.S. 252, 258 (1964). More specifically, did Congress intend that the questioned conduct be free of regulation because it was "to be controlled by the free-play of economic forces"? *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971).

The starting point in determining the pre-emptive reach of the NLRA is Congressional intent as to that statute, not other statutes[3] and not the failure of Congress to speak on the issue here involved. Moreover, by its ex-

[3] Not only does the Second Circuit improperly focus on other statutes rather than the NLRA but in the process inexplicably downplays the District of Columbia statute where Congress has clearly declared strikers disqualified for unemployment compensation.

press reservation of the labor law pre-emption issue in *Ohio Bureau of Employment Services* v. *Hodory*, 45 U.S. L.W. 4544 (No. 75-1707), n. 3,[4] this Court indicated that inquiry into social benefit legislation is not necessarily an answer to the labor law pre-emption question that must be treated when properly invoked. Accordingly, analysis of the NLRA is our task.

The NLRA and its amendments reflect a basic principle of governmental neutrality in the operation of that Act. Section 7 recognizes the right of employees to organize and bargain and also the right to refrain therefrom. 29 U.S.C. 157. These co-equal rights were first expressed in the 1947 amendments when Congress reworked the statute to restore balance.[5] If employees elect to organize, collective bargaining is the prescribed method of dispute resolution, but again in 1947 Congress made clear its views on the process. It was offended by a pattern of NLRB intrusion into the substantive aspects of the bargaining process and so defined the term as to remove this form of governmental interference, 29 U.S.C. 158(d).[6] On the other hand,

[4] The Supreme Court there considered only the pre-emptive effect of the Social Security Act and the Federal Unemployment Tax Act; it expressly declined to consider the pre-emptive effect of the National Labor Relations Act.

[5] "A Committee amendment assures that when the law states that employees are to have the rights guaranteed in §7, the Board will be prevented from compelling employees to exercise such rights against their will, as it has consistently done in the past. In other words, when Congress grants to employees the right to engage in specified activities, it also means to grant them the right to refrain from engaging therein if they do not wish to do so." I Leg. Hist. of the Labor-Management Relations Act 1947 at 318.

[6] "By reason of a number of decisions of the Board, which in effect required an employer to make or offer concessions to show that he was bargaining in good faith, the House definition proposed an objective test for determining what constituted bargaining collectively." I Leg. Hist. of the Labor-Management Relations Act 1947 at 538.



it specifically *permitted state interference* with the collective bargaining process to the extent that compulsory union membership—the economic lifeblood of unions and an otherwise required subject of bargaining—could be barred by state action. 29 U.S.C. 164(b) provides:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

With this singular exception, expressed unequivocally by Congress, the substantive aspects of permissible bargaining are beyond government reach. *H. K. Porter* v. *NLRB*, 397 U.S. 99 (1970).

Even though the substantive aspects of bargaining are left to the parties, Congress has demonstrated that the bargaining relationship is not to be subverted for purposes never intended. In response to its concern that legal services be more readily available to employees, Congress in 1973 expanded the permissible area of bargaining to include a jointly administered trust fund for defraying costs of legal services for employees. Concern was expressed, however, by Senator Taft and others, that employer contributions not be used to finance "offensive legal actions bearing directly on labor-management relations."[7] Accordingly, legal services paid by the trust fund may not be furnished to initiate any proceeding against the em-

[7] "Specifically, such funds should not only be prohibited from use for litigation, but also from counselling and legal advice with respect to disputes or proceedings in the labor-management context." S.Rep. No. 93-139, 93d Cong., 1st Sess. (1973), U.S. Code Cong. & Admin. News 2007, 2010.

ployer or the union. 29 U.S.C. 186(c)(8). Thus, Congress was willing to open up this area to bargaining and to permit, by agreement, the creation of such a benefit fund only on the condition that the employer would not be victimized, in state or federal court actions, by his own contributions.

Where Congress has not clearly spoken, this Court has exercised a vigilant oversight regarding state and federal action which tended to or did jeopardize free collective bargaining. In a series of decisions this Court has stayed the hand of government in order to preserve balance and the legitimate role of self-help. *NLRB* v. *Brown,* 380 U.S. 378 (1965) freed multi-employer associations from the artificial restraints theretofore imposed by the NLRB and permitted them to lockout and hire temporary replacements when one of the member-employers was struck. Similarly, *American Ship Building Co.* v. *NLRB,* 380 U.S. 300 (1965) freed the single employer from those same restraints and permitted the lockout as a device to bring about a settlement of a labor dispute. *NLRB* v. *Mackay Radio,* 304 U.S. 375 (1938) affirmed the employer's right to continue operations and to hire permanent replacements for economic strikers. *Beasley* v. *Food Fair, Inc.,* 416 U.S. 653 (1974) pre-empted a state court damage action and recognized an employer's right to fire his supervisors because of union activity, as being consistent with the purposes of the Act and the legitimate needs of the employer.

Unions have likewise benefited from this same vigilance. *Teamsters Local 20* v. *Morton, supra,* pre-empted an employer's state court damage action for loss of business resulting from non-coercive union appeals to a secondary employer. *NLRB* v. *Insurance Agents' Union,* 361 U.S. 477 (1960) removed the restraint placed by the NLRB on the union weapon of partial strike. *Lodge 76, IAM, supra,*



precluded the state from enjoining partial strikes. *Florida Power & Light Co.* v. *IBEW Local 641,* 417 U.S. 790 (1974) permitted unions to discipline supervisor-members who crossed a lawful picket line to perform struck work.

The evolution of the role of self-help and the recognition of the need for neutrality is dramatically demonstated by this Court's contrary pre-emption decisions in two cases presenting similar facts, *International Union, UAW Local 232* v. *Wisconsin Employment Relations Board* (*Briggs-Stratton*), 336 U.S. 245 (1949) and *Lodge 76, IAM, supra. Briggs-Stratton* held permissible, as not pre-empted by federal labor policy, state action enjoining concerted employee interference with the employer's production process. The Court reasoned that "Congress designedly left open an area for state control" and it found no evidence that Congress had "clearly manifested an exclusion of the state power sought to be exercised in this case". 336 U.S. 253. Twenty-seven years later, with no expression heard from Congress, the Court in *Lodge 76, IAM* held pre-empted state action enjoining a concerted employee refusal to work overtime. The Court said "There is simply no question that the Act's processes would be frustrated . . . were the State's ruling permitted to stand." The Court found it ". . . clear beyond question that Wisconsin '[entered] into the substantive aspects of the bargaining process to an extent the Congress has not countenanced' [citing *NLRB* v. *Insurance Agents,* 361 U.S. at 495]". 96 Supreme Court 2557.

The overruling of *Briggs-Stratton* was based on subsequent judicial insight that federal labor policy required, and was intended by Congress to have, an area free of federal and state regulation, where self-help alone was the regulator. Congressional tolerance of *Briggs-Stratton* obviously was not a factor in the *Lodge 76, IAM* analysis.

Congressional tolerance of the New York statute is equally non-persuasive and represents an improper analysis under *Lodge 76, IAM.*

The Second Circuit, in *New York Telephone,* made only the most fleeting reference to "the otherwise broad pre-emptive scope of the federal labor laws" before concluding that pre-emption did not apply, notwithstanding the finding of conflict between state statute and federal policy. The conflict stems from the District Court findings, not disturbed on appeal, that the expectation or receipt of substantial, weekly, tax-free payments to strikers is a substantial factor in the decision to initiate a strike or in the maintenance of it, and that such payments cause an employer to finance his own striking employees.[8] 434 F. Supp. 813-814, 824.

Given the fact of conflict, the claim of pre-emption may not be cavalierly dismissed in light of Congressional and judicial concern for the integrity of free collective bargaining. This concern has found expression in numerous decisions of this Court. *Farmer* v. *Carpenters, Local 25* makes clear that state action must be "consistent with effective administration of the federal scheme", —— U.S. ——, 97 S.Ct. 1056, 1063 (1977). *Garner* v. *Teamsters Local 776,* often quoted by this Court, with approval, declares:

> "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.", 346 U.S. 485, 500 (1953).

[8] Unemployment compensation is derived solely from an excise tax on wages. This is so whether payment is made under a state program, under the federal-state extended benefit program, or under a temporary, emergency federal program. *Hearings on Unemployment Compensation Benefits Before the Subcommittee on Unemployment Compensation of the House Committee on Ways and Means,* 94th Cong., 1st Sess., Phase I, 62-63, 327-329 (1975).



*Insurance Agents, supra,* quotes, with approval, from the pre Taft-Hartley Senate Report as follows:

> "Experience has proved that neither obedience to law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. Such a course provokes constant strife, not peace. S. Rep. No. 573, 74th Cong., 1st Sess., p. 12." 361 U.S. 484.

In the case *sub judice* it is the employer's right to withstand strike pressure and engage in economic battle that is undermined when unemployment compensation is paid to strikers. Moreover, the struck employer is required to fund the very economic weapon used by the union. This is the antithesis of self-help. It is a forced transfer of help from one combatant to another which simultaneously weakens the former's ability to engage in the very process which Congress has prescribed for settlement of the ultimate impasse.

Inappropriate NLRB action was struck down in the *Insurance Agents* case and as Justice Brennan therein observed:

> "Our labor policy is not presently erected on a foundation of government control of the results of negotiations. See S.Rep. No. 105, 80th Cong., 1st Sess., p. 2. Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." 361 U.S. 490.

Similarly, no state can properly act through its Unemployment Compensation Law to equalize or tamper with disparities of bargaining power between employer and union. Finally, as so aptly set forth in the concurring opinion of Justice Powell in *Lodge 76, IAM, supra*:

> ". . . the Wisconsin law, as applied in this case, is pre-empted since it directly curtails the self-help capability of the union and its members, resulting in a significant shift in the balance of free economic bargaining power struck by Congress." 96 S.Ct. 2560.

Patently, the payment of unemployment compensation benefits to strikers "curtails the self-help capability" of the employer and results in a "significant shift in the balance of free economic bargaining power struck by Congress".

## II

**State freedom to compensate strikers threatens national labor policy on a broad front.**

The State of New York regards an eight-week disqualification of strikers as the measure of state neutrality in labor disputes affecting interstate and intrastate commerce. *New York Telephone, supra,* n. 5. In Rhode Island, the measure is seven weeks. If state legislative judgment is predominant, there is no obstacle to concluding that a more accurate measure of neutrality is a five-week, three-week, or one-week disqualification for strikers, as well as for those locked out. Most states presently consider that a benefit of one-half the average weekly wage is a justifiable level of compensation in terms of the program's social objectives. But these states are free to increase that ratio, just as the states are free to increase the taxable wage base. Puerto Rico, for example, levies its tax on 100% of the wages paid, rather than on the first $6,000 dollars of wages, which is the base observed by most states.[9]



Accordingly, a lower disqualification period and higher benefit would more easily crush employer resistance. Unions and strikers could declare open season on an employer's checkbook, one way or the other, through higher settlements or longer strikes. A perfect 'heads I win—tails you lose' situation.

The risk of further undermining federal labor policy is all too apparent where strikers can receive benefits despite their disregard or violation of federal labor law.[10] The Act does not require the NLRB to seek injunctive relief for every unlawful strike, only those reasonably thought by the Board to involve unlawful secondary or recognitional objectives. Given the Board's reluctance to use its discretionary authority to enjoin other unlawful conduct,[11] a union strike in support of an unlawful bargaining demand can be maintained for an extended time before Board adjudication.

Thus, despite disregard for federal law and illegal activity on the part of strikers, the victim of this conduct, the employer, can be forced *solely because of state law* to

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[9] *Hearings on Unemployment Compensation Benefits, supra,* 54.

[10] Witness the fact that the strike in the New York Telephone matter was indeed found to be an illegal strike under federal labor law, 208 NLRB 267 (1974).

[11] Exercised on only 25 occasions in fiscal 1976, 41st Annual Report of NLRB, 255.

finance its perpetration. Fair play and reasonable rules to regulate commerce are meaningless if this is permitted. In reality, such laws will provoke constant strife, not peace, disobedience, not respect for the law.

## CONCLUSION

**The pre-emption concepts enunciated by this Court require its review of the Second Circuit decision. Otherwise, that doctrine, which has been so thoughtfully developed by this Court in its different aspects, will experience significant erosion, all to the detriment of a national policy it was designed to protect.**

Respectfully submitted,

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Supreme Court, U. S.
FILED
JAN 11 1978
MICHAEL RODAK, JR., CLERK

In The

# Supreme Court of the United States

October Term, 1977

No. 77-961

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NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

*v.*

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., State Commissioner of Taxation and Finance,

*Respondents.*

---

## IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

[redacted] Rochester Telephone Corporation, General Electric Company, Otis Elevator Company, American Broadcasting Companies, Inc., Associated Industries of New York, Inc., Empire State Chamber of Commerce, Inc. and The New York Chamber of Commerce & Industry [redacted] and Brief *Amici Curiae*

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In The

# Supreme Court of the United States

October Term, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

*v.*

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., State Commissioner of Taxation and Finance,

*Respondents.*

## IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## Brief for Rochester Telephone Corporation, General Electric Company, Otis Elevator Company, American Broadcasting Companies, Inc., Associated Industries of New York, Inc., Empire State Chamber of Commerce, Inc. and The New York Chamber of Commerce & Industry, as *Amici Curiae*

### Interest of the Amici Curiae

The question before the Court is whether New York's grant of employer-financed unemployment insurance benefits to strikers is preempted by the National Labor Relations Act, *as amended*, 29 U.S.C. §§ 141 *et seq.* and by the underlying policy of the Act

which guarantees government neutrality in the collective bargaining process. The interest of each of the *amici* in the resolution of this issue is substantial.

In 1974-1975, Rochester Telephone Corporation (hereinafter "RTC"), a publicly held utility having no affiliation with the Bell System, experienced a six-month strike by the Communications Workers of America, Local 1170. After waiting seven weeks, approximately 1,000 of the striking employees applied for and received unemployment insurance benefits from the State of New York. The benefit payments resulted in a drain on RTC's individual unemployment insurance account of $2,291,990. As a result, RTC's unemployment insurance tax rate was increased substantially, and it is estimated that RTC eventually will be required to pay an additional $1,786,357 in unemployment insurance taxes because of the payment of benefits to strikers during the 1974-1975 strike.

In 1969-1970, General Electric Company (hereinafter "GE") experienced a three-month nationwide strike. Upwards of 14,000 of GE's employees in the State of New York applied for and received unemployment insurance benefits during the course of this strike. The benefit payments resulted in a drain on GE's individual unemployment insurance account of approximately $7,700,000. As a result, GE's unemployment insurance tax rate substantially increased. Between October 1, 1970, and September 30, 1974, GE paid an additional $6,224,000 in unemployment insurance taxes as a direct result of the payment of benefits to its striking employees in New York during the 1969-1970 strike.

Between March 30, 1972, and July 8, 1972, Otis Elevator Company (hereinafter "Otis") was subjected to a nationwide strike by its employees represented by the International Union of Elevator Constructors. Between July 1, 1972, and February 7, 1973, Otis was also subjected to a strike by its employees represented by Local No. 1 of the International Union of



Elevator Constructors and employed within a 35-mile radius of the City Hall of the City of New York, except Monmouth, New Jersey, but including all of Long Island. During the course of these strikes, approximately $1,200,000 in unemployment insurance benefits were paid to about 1,000 of Otis's striking employees who were employed in New York State. Otis's unemployment insurance tax rate increased from 1.2 percent in 1972 to 2.7 percent in both 1973 and 1974. As a result, Otis paid approximately $208,000 in increased taxes in 1973 and approximately $240,000 in increased taxes in 1974.

American Broadcasting Companies, Inc. (hereinafter "ABC") was subjected to a strike by approximately 700 of its New York employees from May 19, 1977 to October 1, 1977. ABC brought suit in the Southern District of New York to enjoin the State from paying unemployment insurance benefits to its striking employees and from collecting increased unemployment insurance taxes as a result of any such payments. On June 30, 1977, Judge Cannella granted the employer's motion for a preliminary injunction. *American Broadcasting Companies, Inc. v. New York State Department of Labor*, Civ. No. 77-2995 (S.D.N.Y. June 30, 1977) [Judge Cannella's unreported decision is appended hereto].

This determination was appealed by the State of New York to the United States Court of Appeals for the Second Circuit, which stayed Judge Cannella's order so that approximately $564,000 in benefits were paid to ABC's striking employees. That proceeding is now held in abeyance pursuant to an understanding between the State and ABC that, if this Court leaves unaltered the lower court's decision in *New York Telephone Co. v. New York State Department of Labor*, Civ. No. 77-7337 (2d Cir. Nov. 9, 1977), the payment of such benefits will be charged to ABC's account and its unemployment insurance tax rate will be increased accordingly.

GE and Otis presently have pending before the District Courts of the Northern and Southern Districts of New York, respectively, suits to enjoin future payment of unemployment insurance benefits to strikers, and to recoup the excess unemployment insurance taxes which they have paid. RTC has pending before the Unemployment Insurance Division of the New York State Department of Labor an administrative proceeding to recoup the excess contributions paid by it to the Unemployment Insurance Fund as a result of the payment of benefits to strikers. The court actions and the administrative proceeding are being held in abeyance pending the outcome of the case at bar.

Associated Industries of New York State, Inc. (hereinafter "Associated Industries") is a non-profit corporation organized under the laws of the State of New York, where it has served industry since 1914. It has approximately 2,700 member companies with offices and plants in all parts of the State. The membership includes both manufacturing and non-manufacturing firms which together account for billions of dollars in annual business activity.

Empire State Chamber of Commerce, Inc. (hereinafter "Empire") is a not-for-profit corporation organized under the laws of the State of New York. Empire represents local chambers of commerce, business and trade organizations and associations, and individual companies. Its members, located throughout the State, span a broad crosssection of business activity. They are engaged in banking, insurance, commercial, industrial, manufacturing and professional activities, among others.

The New York Chamber of Commerce & Industry (hereinafter "New York Chamber") is a voluntary business association chartered by the State of New York. It is the oldest chamber of commerce in the United States, having been founded in 1768. The current general membership of the New



York Chamber consists of over 2,500 business proprietorships, partnerships and corporations, representing the full spectrum of commerce and industry in New York. This broad membership is comprised of businesses of all sizes engaged in virtually all branches of industry.

The combined membership of Associated Industries, Empire and the New York Chamber employs upwards of 1,000,000 employees in New York State. Virtually all members are covered by the New York State Unemployment Insurance Law, and a substantial number bargain collectively under the National Labor Relations Act. The interest of the organizations and their membership is therefore substantial.

## Summary of Argument

The issue whether the granting of unemployment insurance benefits to strikers is preempted by the National Labor Relations Act urgently requires resolution by this Court. That it is of national significance is dramatically underscored by the number of cases currently before the federal courts which deal with the identical generic question.

The two circuit courts which have considered whether Congress intended when it enacted the NLRA to prohibit the states from granting unemployment insurance benefits to strikers have reached different conclusions. While the First Circuit has decided that the relevant legislative history reveals no clear evidence of congressional intent, the Second Circuit has concluded that the same legislative history evidences Congress's intention to leave the States free to regulate in this area. Thus, unless this Court grants Petitioners' application, numerous federal courts will be forced to address the issue with a minimum of guidance.

The Second Circuit Court of Appeals, we submit, has grievously erred in reaching its conclusion. It has inferred from isolated bits of legislative history, without regard for the broad scope of the preemption doctrine formulated by the courts to safeguard rights guaranteed by the NLRA, that Congress intended to permit the States to grant employer-financed unemployment insurance benefits to strikers pursuant to statutes such as New York's.[1] Because the Court's erroneous decision sanctions state legislation which has the potential for seriously undermining the entire process of unfettered collective bargaining that is fundamental to achievement of the NLRA's objectives, it must be reversed.

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[1]Section 592(1) of the New York Labor Law (McKinney 1977) provides for the payment of unemployment compensation to strikers after a "Suspension of accumulation of benefit rights":

> 1. Industrial controversy. The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning with the day after such strike, lockout, or other industrial controversy was terminated.



## ARGUMENT

## REASONS FOR GRANTING THE WRIT

**The Court should grant Petitioners' Application for a Writ of Certiorari.**

### I.

**Because two circuit courts fundamentally disagree as to whether Congress intended when it enacted the National Labor Relations Act to permit the States to grant employer-financed unemployment insurance benefits to strikers, the Supreme Court must clarify the issue in order to guide federal courts confronted with the identical question.**

The basic issue presented by the case which Petitioners seek to put before this Court is whether Congress, when it enacted the National Labor Relations Act, *as amended*, 29 U.S.C. §§141 *et seq.* (hereinafter "NLRA" or the "Act") intended to forbid the States from granting unemployment insurance benefits to strikers. Two United States Circuit Courts have examined the issue, but have arrived at inconsistent opinions with respect to its resolution.

The United States Court of Appeals for the First Circuit addressed the question in *Grinnell Corp. v. Hackett*, 475 F.2d 449 (1st Cir.), *cert. denied*, 414 U.S. 858 and 414 U.S. 879 (1973). After conducting an exhaustive examination of the applicable legislative history, that Court concluded that whether Congress intended to forbid or to allow such regulation by the States is unclear:

> The *most* that can fairly be said, in the face of this legislative record, is that Congress has been and presently is aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances.
>
> *[U]nambiguous Congressional intent is lacking . . .*

*Grinnell Corp. v. Hackett, supra* at 457 (emphasis supplied).

At least three district courts have found Judge Coffin's analysis to be well-reasoned and have reached the same conclusion. *See American Broadcasting Companies, Inc. v. New York State Department of Labor*, Civ. No. 77-2995 (S.D.N.Y. June 30, 1977) (Appendix) as well as *New York Telephone Co. v. New York State Department of Labor*, 434 F.Supp. 810 (S.D.N.Y. 1977); *Hawaiian Telephone Co. v. State of Hawaii Department of Labor and Industrial Relations*, 405 F.Supp. 275 (D. Hawaii 1975); *Dow Chemical Co. v. Taylor*, 57 F.R.D. 105 (E.D. Mich. 1972).

The United States Court of Appeals for the Second Circuit in *New York Telephone Co. v. New York State Department of Labor*, Civ. No. 77-7337 (2d Cir. Nov. 9, 1977) (hereinafter *"New York Telco"*) reviewed the very same historical elements examined by the First Circuit in *Grinnell*. Nonetheless, it concluded that Congress "has evinced an intention to leave the States free to regulate in this area." *New York Telco*, slip op. at 13.[2] The Court identified its fundamental disagreement with the First Circuit:

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[2]Furthermore, even though presented with a record detailing the numerous issues of law and fact essential for resolution of the preemption question, the Second Circuit failed to discuss those issues which the Court in *Grinnell* found pivotal to a determination.

Judge Coffin determined in *Grinnell* that since unambiguous congressional intent on the preemption question is lacking, a court must look to whether the payment of unemployment insurance benefits to strikers palpably infringes upon federal labor policy and whether the state interest in providing those benefits is sufficient to outweigh any such infringement. *Grinnell Corp. v. Hackett*, 475 F.2d 449, 457 (1st Cir. 1973). Because the Court could not adequately examine those issues on the basis of the record before it, it reversed the dismissal of the plaintiff's complaint and remanded the case for further proceedings consistent with its determination. *Grinnell Corp. v. Hackett*, *supra* at 461.

Although the Court of Appeals in the case at bar failed to discuss the issue whether the payment of unemployment insurance benefits to strikers impacts upon the collective bargaining process, it accepted the fact that a "conflict" between the challenged statute and federal labor policy exists. *New York Telco*, slip op. at 13; *see* Point III *infra*.



> Those courts that have considered Congress' intent with respect to the payment of unemployment benefits to strikers have found it "ambiguous." *Grinnel Corp. v. Hackett*, 475 F.2d 449, 454-57 (1st Cir.), *cert. denied*, 414 U.S. 858 (1973); *Hawaiian Telephone Co. v. Hawaii Department of Labor & Industrial Relations*, 405 F.Supp. 275, 286 (D. Hawaii 1976). We do not agree.

*New York Telco*, slip op. at 5-6.

As previously indicated, the United States District Court for the District of Hawaii, after reviewing the salient legislative history, agreed with Judge Coffin's conclusion in *Grinnell* that evidence indicating whether Congress intended to allow the states to provide unemployment insurance benefits for strikers is lacking. *Hawaiian Telephone Co. v. State of Hawaii Department of Labor and Industrial Relations*, 405 F.Supp. 275 (D. Hawaii 1975), *appeals docketed*, Civ. Nos. 76-1584, 76-2056 (9th Cir. Mar. 19, 1976; May 12, 1976) (hereinafter *"Hawaiian Telco"*). Because it was unable to reach a determination on the basis of legislative history, the Court examined the impact of the payment of unemployment insurance benefits on the collective bargaining process. It concluded that the granting of such benefits constitutes an impermissible intrusion upon the unhampered bargaining process guaranteed by the NLRA. Therefore, it found the challenged statute preempted by federal labor policy. *Hawaiian Telco*, *supra* at 290.

Appeals from the Hawaii District Court's Order are now pending before the United States Court of Appeals for the Ninth Circuit. Thus, the Circuit Court is in the unenviable position of being forced to choose between Judge Coffin's analysis in *Grinnell* and Judge Meskill's conclusions in *New York Telco*. If it agrees with the First Circuit, it surely will affirm the District Court's decision; but, if if concludes that the Second Circuit was correct, it must reverse. Regardless of which determination the Ninth Circuit renders, it cannot bind the remaining circuit courts. Only this Court can resolve the disagreement and thus

guide the myriad of tribunals which will be confronted by this question in the future.

## II.

**The issues presented by this case merit the attention of the United States Supreme Court.**

This Court in the past has closely attended to preemption issues, and has consistently confirmed its intent to safeguard the federal law of labor-management relations from state interference. See Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972) and cases cited therein. Moreover, in recent years it has rendered decisions on related issues and has carefully reserved for future consideration the question presented herein. *See, e.g., Ohio Bureau of Employment Services v. Hodory*, 45 U.S.L.W. 4544, 4545 n.3 (May 31, 1977); *Batterton v. Francis*, 45 U.S.L.W. 4768, 4770 n.7 (June 21, 1977); *Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974).

The central issue in *New York Telco* is one of national significance, for it involves the time-honored and pervasive doctrine of federal labor law preemption. If the disputed New York statute is allowed to stand, the collective bargaining process which is fundamental to achievement of the NLRA's purposes will continue to be eroded by union utilization of unemployment insurance benefits as a source of strike support. This case, which includes a record amply detailing the impact that the payment of such benefits to strikers has upon the collective bargaining process, presents the Court with an excellent vehicle for resolution of its underlying issue.

The importance of the issue which Petitioners seek to put before the Court is dramatically underscored by the number of current cases involving the very issue here presented. *See Grinnell Corp. v. Hackett, supra; Hawaiian Telco, supra;*



*Dow Chemical Co. v. Taylor, supra; American Broadcasting Companies, Inc. v. New York State Department of Labor, supra; Shell Oil Co. v. Brooks*, Civ. No. 74-1935 (W.D. Wash.); *Otis Elevator Co. v. New York State Department of Labor*, Civ. No. 75-6463 (S.D.N.Y.); *General Electric Co. v. New York State Unemployment Insurance Fund*, Civ. No. 75-602 (N.D.N.Y.); *Hawaii Employers Council v. State of Hawaii Department of Labor and Industrial Relations (Pearl Harbor Federal Credit Union)*, Civ. No. 74-262 (D. Hawaii); *Hawaii Employers Council v. State of Hawaii Department of Labor and Industrial Relations (Edward D. Sultan Co.)*, Civ. No. 74-285 (D. Hawaii); *Westinghouse Broadcasting Co. v. Massachusetts*, Civ. No. 76-1409-S (D. Mass.); *Eagle Electric Manufacturing Co. v. New York State Department of Labor*, Civ. No. 77-3925 (S.D.N.Y.); *Jarl Extrusions, Inc. v. Ross*, Civ. No. 77-412 (W.D.N.Y.); *Ford Aerospace and Communications Corp. v. State of Hawaii Department of Labor and Industrial Relations*, Civ. No. 75-44 (D. Hawaii); *Mail-Well Envelope Co. v. State of Hawaii Department of Labor and Industrial Relations*, Civ. No. 75-131 (D. Hawaii); *Spargo Wire Co. v. New York State Unemployment Insurance Fund*, Civ. No. 77-520 (N.D.N.Y.).

## III.

**Congress has not demonstrated an intention to allow the States to grant unemployment insurance benefits to strikers and thus to disrupt the balance of economic power which lies at the heart of the collective bargaining process.**

Analytic inquiry into the question whether a state statute which grants unemployment insurance benefits to strikers conflicts with federal law requires an examination of the judicial doctrine of labor law preemption which has evolved since enactment of the NLRA. Curiously, the Second Circuit based its opinion in the case at bar primarily upon a federal statute other than that which governs the field of labor-management relations. Because it failed to review legislative history against

the sweeping federal policy favoring zealous protection of the collective bargaining process, the Court of Appeals made a fundamental error in reaching its determination to uphold the New York statute.

The preemption doctrine teaches that because economic warfare is so fundamental a part of the bargaining process, the NLRA envisions a "free play of economic forces" which simply is not subject to state regulation. *Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 144 (1976); *see NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960). It is beyond cavil, and indeed is not seriously disputed by either Respondents or the Court below, that the record in the case at bar clearly demonstrates the significant influence upon collective bargaining exerted by the payment of unemployment insurance benefits to striking employees.[3] Direct subsidy for strikers provides a negotiating union's membership with the financial means to refrain from returning to work before their demands at the bargaining table are met, and at the same time, since the subsidy is financed with the struck employer's funds, it saps strength from the employer's economic

[3]In a related case, this Court took judicial notice of the overwhelming influence upon collective bargaining of payments made to strikers through welfare assistance programs:

> It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract. The question, of course, is whether Congress, explicitly or implicitly has ruled out such assistance in its calculus of laws. . . .

*Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 124 (1974). Unemployment insurance benefits have an even more substantial financial impact upon the employer's position than do welfare benefits, for the former are available as of right to all strikers while the latter are granted only on the basis of need.



force by substantially increasing the costs associated with the strike.[4] Management negotiators are motivated by the unemployment insurance scheme to accede to union demands before the strikers' benefits begin to accumulate, causing the employer's insurance fund to be depleted and insurance contribution rates to rise.[5] Thus, the challenged New York statute acts as a double-edged sword against a negotiating employer, at one time both draining from management's stength and enhancing labor's.

As Professor Cox so aptly pointed out in his most recent article on labor law preemption:

> [W]here the state law or rule of decision is based upon an accommodation of the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining, or labor disputes . . . the likelihood that its application to persons under NLRB jurisdiction will upset the balance struck by Congress *is so great as to require exclusion of state law unless Congress has provided otherwise.*

Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1356 (1972) (emphasis supplied). The Second Circuit recognized that the challenged New York statute "is based upon an accommodation of the special interests of employers [and] unions . . . in . . . collective bargaining," for it cited the "conflict" between the state law and the broad federal policy of

[4]New York Labor Law Section 592(1) (McKinney 1977) grants strikers unemployment insurance benefits after a seven-week suspension period. Benefit payments are made from an unemployment insurance fund which, under New York Labor Law Section 570(1), is financed by the struck employer.

[5]An employer's experience rating determines the amount of its contributions to the fund. The rating has as its basis the sum remaining in the employer's individual account at the end of a year after contributions are credited and benefits paid are debited.

free collective bargaining. Yet, notwithstanding the magnitude of the conflict, the Court determined that "[it] is one which Congress has decided to tolerate." *New York Telco*, slip op. at 13.

The Court positively inferred from Congress's failure in Title IX of the Social Security Act of 1935, *as amended*, 42 U.S.C. §§501 *et seq.*[6] to expressly prohibit the payment of unemployment insurance benefits to strikers that Congress intended to tolerate the conflict between statutes permitting such payments and national labor policy. In interpreting the relevant legislative history to reach this conclusion, however, the Court committed three fundamental errors: (1) it incorrectly applied the maxim *expressio unius est exclusio alterius* to the Social Security Act provision relied upon; (2) it placed unwarranted reliance upon congressional inaction to infer congressional intent; and (3) it allowed a subsequently enacted statute of general import, to wit, the Social Security Act, to impliedly repeal a statute of specific import, the NLRA.

The Second Circuit assumed from Congress's painstaking specification of certain individuals to whom the States cannot deny benefits that it must have intended to allow the States to grant benefits to strikers. If it had intended to do so, the Court apparently reasoned, Congress could — and would — have expressly proscribed the granting of such benefits. The Court's application of the *expressio unius est exclusio alterius* doctrine, however, was incorrect because the Social Security Act identified only those who should be *entitled* to unemployment insurance benefits, and not those who should be *denied* benefits.

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[6]The Act is now known as the Federal Unemployment Tax Act, 26 U.S.C. §§3301-09.



In addition, the Court was persuaded by Congress's *failure* to expressly prohibit the payment of unemployment insurance benefits to striking employees that it intended to allow the States to grant such benefits. Such reliance upon congressional inaction to infer congressional intent is clearly unjustified. As this Court has repeatedly noted:

> [N]onaction by Congress affords the most dubious foundation for drawing positive inferences . . . . Whether Congress thought the proposal unwise . . . or unnecessary, we cannot tell; accordingly, no inference can properly be drawn from the failure of the Congress to act.

*United States v. Price*, 361 U.S. 304, 310-13 (1960). *See also Zuber v. Allen*, 396 U.S. 168, 185 (1969); *Waterman S.S. Corp. v. United States*, 381 U.S. 252 (1965); *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

Finally, in placing such emphasis upon the Social Security Act, the Court appears to have violated a cardinal rule of statutory construction that a subsequently enacted statute of general import cannot impliedly repeal an earlier enactment of specific import. *See United States v. United Continental Tuna Corp.*, 425 U.S. 164 (1976); *Morton v. Mancari*, 417 U.S. 535 (1974). The NLRA specifically addresses itself to the collective bargaining process and the States' role therein. The Social Security Act, on the other hand, does not address that process at all. Yet, the Second Circuit allowed Congress's failure to prohibit the benefit payments now is dispute when it enacted the Social Security Act to create an exception to the rule that the States may not interfere in the collective bargaining process.

The Second Circuit cited *Ohio Bureau of Employment Services v. Hodory*, 45 U.S.L.W. 4544 (May 31, 1977) (hereinafter *"Hodory"*), to support the inferences which it drew from the Social Security Act. However, the Court's reliance upon *Hodory* was misplaced. As the Second Circuit itself has noted, this Court in *Hodory* specifically declined inquiry into the preemptive effects of the NLRA upon the disputed statute, presumably leaving that issue for a case such as the one at bar. *New York Telco*, slip op. at 7 n.3, *citing Hodory*, *supra* at 4545 n.3.

Moreover, even if this Court had declared in *Hodory* that the Ohio statute was not preempted by the NLRA, the issue in this case would not be decided. A statute such as Ohio's, which *bars* the payment of unemployment insurance benefits to strikers, does nothing more than maintain the neutrality required by the Act. It reinforces — and is therefore compatible with — the principle of free collective bargaining which underlies the federal law of labor-management relations. Indeed, as this Court pointed out in *Hodory*, the disqualification in the Ohio statute was at least in part justified by the State's desire to remain neutral in labor disputes. *See Hodory*, *supra* at 4550.



## CONCLUSION

For the foregoing reasons, and for those put forth in the petition for certiorari pending before the Court, we respectfully submit that the Court should issue a writ of certiorari to the Second Circuit Court of Appeals in order that it may hear, and decide, the issue whether the NLRA and its underlying policies preempt state laws providing unemployment insurance benefits to strikers at the expense of their struck employers.

Dated: January 10, 1978

Respectfully submitted,

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# APPENDIX

# DECISION AND ORDER

## UNITED STATES DISTRICT COURT
## SOUTHERN DISTRICT OF NEW YORK

---

AMERICAN BROADCASTING COMPANIES, INC.,
*Plaintiff,*

*—against-*

NEW YORK STATE DEPARTMENT OF LABOR; LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; and JAMES H. TULLY, JR., State Commissioner of Taxation and Finance,
*Defendants.*

77 Civ. 2995
(JMC)

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CANNELLA, D.J.:

Motion for a preliminary injunction, pursuant to Fed. R. Civ. P. 65, restraining the defendants from paying unemployment insurance benefits to plaintiff's striking employees, is hereby granted.

On May 17, 1977 the engineers employed by plaintiff, the American Broadcasting Companies, Inc. ["ABC"], went on strike. These engineers are represented by the National Association of Broadcast Employees and Technicians ["NABET"]. Pursuant to § 592(1) of the New York State Unemployment Insurance Law, these striking employees will be eligible for unemployment benefits on July 5, 1977 and expect to begin receiving weekly checks shortly after July 12, 1977. Although unemployment checks are distributed by the State, the expense is actually borne by the employers who maintain accounts upon which vouchers are drawn for this purpose.

ABC, relying upon Judge Owen's recent Opinion in New York Telephone Co. v. New York State Department of Labor ["Telco"], 73 Civ. 4557 (S.D.N.Y. May 24, 1977), claims that the payment of unemployment benefits to strikers is pre-empted by federal labor policy. While not wholly adopting Judge Owen's reasoning and conclusions, the Court finds that plaintiffs are entitled to preliminary injunctive relief. Because of the *Telco* case, a decision after trial upon an extensive record, the instant controversy raises "sufficiently serious questions going to the merits to make them a fair ground for litigation . . . ." Sonesta Int'l Hotels Corp. v. Wellington Assocs., 483 F.2d 247, 250 (2d Cir. 1973). Additionally, ABC has established that the irreparable injury it has suffered tips the balance of hardships decidedly in its favor. Jacobson & Co., Inc. v. Armstrong Cork Co., 548 F.2d 438, 440-41 (2d Cir. 1977); Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356 (2d Cir. 1976); *Sonesta Int'l Hotels Corp., supra.*

In *Telco*, Judge Owen labelled "a fundamental truism [sic] [the fact] that the availability to, or expectation or receipt of a substantial weekly, tax-free payment of money by, a striker is a substantial factor affecting his willingness to go on strike or, once on strike, to remain on strike, in the pursuit of desired goals." *Telco, supra* slip op. at 7 (footnotes omitted). The evidence at trial was found by Judge Owen to confirm this truism. Based upon this finding, he concluded that the New York law authorizing such payments conflicts with the federal policy of free collective bargaining and is thus invalid under the Supremacy Clause of the Constitution. In an order signed June 24, 1977, Judge Owen enjoined enforcement of the Unemployment Insurance Law "to the extent that it provides for the payment of unemployment compensation to strikers . . ." *Telco*, Declaratory Judgment and Order for Permanent Injunction, slip op. at 2. (S.D.N.Y. June 24, 1977). Circuit



Judge Mansfield granted the *Telco* defendants, who are also the defendants herein, a temporary stay of Judge Owen's order pending argument on the motion for a stay pending appeal scheduled for June 30, 1977. Although denial of a stay of the extremely broad *Telco* order would operate to give ABC the relief it seeks in the instant action, the granting of a stay would not preclude this Court from issuing an injunction specifically directed at the ABC strikers.

The legal issues involved in this case are unsettled. The *Telco* decision apparently represents the first time a court in this district has spoken on the question whether federal labor policy pre-empts § 592(1). Defendants contend that the Supreme Court's dismissal for want of a federal question in Kimbell, Inc. v. Employment Security Commission of New Mexico, 429 U.S. 804 (1976), as well as its opinion in Ohio Bureau of Employment Services v. Hodory, 45 U.S.L.W. 4544 (U.S. May 31, 1977), renders *Telco* erroneous. However, the basis for the *Kimbell* decision is anything but clear, *compare* Super Tire Engineering Co. v. McCorkle, 550 F.2d 903 (3rd Cir. 1977), *with* Dow Chemical Co. v. Taylor, No. 38644 (E.D. Mich. Feb. 9, 1977), and the precise pre-emption issue involved herein was specifically left unresolved in *Hodory*, see 45 U.S.L.W. at 4545 n.3. The issue is further beclouded by the fact that the state unemployment statutes construed by courts in other jurisdictions differ from the New York scheme regarding eligibility requirements for striking employees. *See* Hawaiian Tel. Co. v. Hawaii Dep't of Labor, 405 F. Supp. 275 (D. Hawaii 1975); Albuquerque-Phoenix Express, Inc. v. Employment Security Comm'n, 544 P. 2d 1161 (N.M. 1975).

In spite of the above uncertainty, this Court agrees with Judge Owen that the expectation of unemployment benefits is a significant factor in prolonging a strike. This being the case, a substantial question arises as to whether the State, in providing

such benefits for striking employees, is in conflict with the federal labor policy of free and unhampered collective bargaining. Conflicting inferences may be drawn from the legislative history accompanying the federal labor laws such that congressional intent is difficult to fathom. *See, e.g.*, Grinnell Corp. v. Hackett, 475 F.2d 449, 454-57 (1st Cir. 1973), *cert. denied*, 414 U.S. 858, 879 (1973).

Having found that plaintiff presents a substantial question going to the merits, a preliminary injunction will issue if, without such relief, plaintiff may suffer irreparable harm decidedly greater than that suffered by the defendant under the injunction. In this regard, defendant has produced absolutely no affidavits or other evidence indicating the injury sufferable by reason of an injunction. The Court, of course, realizes that the striking employees will suffer the loss of weekly unemployment checks; in that unemployment benefits are not distributed on a "need" basis, however, the Court is unable to speculate as to the grievousness of this loss.[1]

By contrast, ABC has submitted affidavits indicating the irreparable injury it has suffered, and will continue to suffer, while the strike continues. Based upon the Court's finding that the expectation of unemployment benefits operates to lengthen the duration of the strike, the injury suffered by virtue of the strike is caused, at least in part, by the State's enforcement of § 592(1).

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[1]The Court at this time expresses no opinion as to whether NABET, as representative of the striking employees, is an indispensable party to this action. See Fed. R. Civ. P. 19. However, the Court will entertain a motion by NABET to intervene if the union deems such action necessary in order to protect its interest and the interest of its members in the pending litigation. For this reason, plaintiff is hereby directed to serve a copy of this decision on the union by Tuesday, July 5, 1977.



According to Julius Barnathan, the President of Broadcast Operations and Engineering of ABC, plaintiff has been forced to reduce its in-studio production and its coverage of news and major sporting events. For example, the May 23, 1977 baseball game between New York and Boston was not televised due to pressure applied to Yankee management by the union. Barnathan further stated that the limited non-union manpower has caused ABC to cease servicing an independent company that provides syndicated news to foreign broadcasters. Additionally, the broadcast of sporting events during this period has suffered technically.

According to Nicholas Archer, Vice President of Television News Service of ABC News, the strike has caused ABC "to lose most of its Electronic News Gathering ["ENG"] capabilities utilizing hand-held portable electronic tape and live cameras, and is instead relying almost exclusively on film cameras. This substitution prevents ABC from broadcasting stories breaking shortly before air time, and no longer gives ABC the ability to transmit live stories from the field during the course of news broadcasts or emergency bulletins." Archer Affidavit ¶ 3. The strike has prevented ABC from covering significant news stories such as President Carter's speech before the United Auto Workers Union and the terrorist attack on the Yugoslav Mission in New York City. ABC's cutting back on its late night news syndication may very well result in loss of goodwill from subscribers.

Hand in hand with the injury suffered by ABC is the harm caused to the public at large by the reduction in services of a major television network. As stated by Barnathan, "Any information or material which ABC is prevented from covering in its entirety can never be retrieved and presented to the public in a timely manner." Barnathan Affidavit ¶ 13.

In addition to the above, the payment of benefits to the ABC strikers will reduce plaintiff's insurance fund by approximately $66,500/week. Although Judge Owen ruled that the eleventh amendment does not bar a suit by an employer to recover these monies from the State, *Telco*, slip op. at 36-37, that issue will be hotly contested on appeal. It is therefore possible that, should the Second Circuit agree with Judge Owen on the pre-emption issue, ABC will still be unable to recover the amounts drawn on its fund account.

In contrast to the defendants' failure to establish any injury on their part should the injunction issue, plaintiff has shown that without an injunction they will suffer irreparably. Hence, the balance of hardships tips decidedly in plaintiff's favor. *See, e.g., Sonesta Int'l Hotels Corp., supra.* Having met the standard for the issuance of a preliminary injunction, plaintiff's motion is hereby granted.

Accordingly, the defendants are hereby enjoined from making payments to, as well as from implementing any of the provisions of the New York Unemployment Insurance Law authorizing or requiring them to make payments to, the striking employees of ABC.

The foregoing constitute the findings of fact and conclusions of law of the Court pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

SO ORDERED.

/s/ JOHN M. CANNELLA
John M. Cannella
*United States District Judge*

Dated: New York, N.Y.
June 30, 1977.

No. 77-961

Supreme Court, U. S.
FILED
JAN 18 1978
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1977

**NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),**

*Petitioners,*

vs.

**NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION AND FINANCE,**

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT

## BRIEF AMICI CURIAE ON BEHALF OF THE DOW CHEMICAL COMPANY AND THE SHELL OIL COMPANY IN SUPPORT OF THE PETITION FOR CERTIORARI

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# In the
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*Petitioners,*

VS.

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*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT

---

# BRIEF AMICI CURIAE ON BEHALF OF THE DOW CHEMICAL COMPANY AND THE SHELL OIL COMPANY IN SUPPORT OF THE PETITION FOR CERTIORARI

---

## INTEREST OF THE AMICI CURIAE*

The Dow Chemical Company ("Dow") and Shell Oil Company ("Shell") are employers in interstate commerce, subject to both the bargaining obligations of the National Labor Relations Act (29 USC §§141 et seq.) and the unemployment compensation statutes of the various states in which they have employees, including New York. The decision in the Court below, permitting the State of New York to continue the practice of paying unemployment compensation benefits to striking employees, thus presents a question of substantial interest to both Dow and Shell. As will be demonstrated herein, the factual pattern now before this Court does not represent a single isolated incident, but is instead one of numerous similar, factual patterns frequently recurring throughout the Nation.

Dow, for example, is currently engaged in litigation in the United States District Court for the Eastern District of Michigan, now on interlocutory appeal to the United States Court of Appeals for the Sixth Circuit, which also contest the validity of the grant of state unemployment benefits to employees during a labor dispute. *Dow Chemical Co.* v. *Taylor,* 428 F. Supp. 86 (E.D. Mich., 1977), certified to the Sixth Circuit (E.D. Mich.) (May 19, 1977) (No. 77-8064). The history of that case closely resembles the instant litigation. In 1972 and 1974, the United States Steelworkers of America (the "Steelworkers") struck manufacturing facilities of Dow located at Bay City and Midland, Michigan. The strikers immediately applied for and in the substantial majority of situations received compensation benefits under the Michigan Unemployment Com-

* This brief is being filed with the written consents of all parties. Pursuant to Supreme Court Rule 42(1), these consents are being filed simultaneously under separate cover with the Clerk of the Court.



pensation Law, M.C.L.R. §421.29 (8).[1] This mass utilization of unemployment compensation benefits was not a fortuitous or unplanned development. It was an integral part of the Steelworkers' strike strategy, just as it was an integral component of the CWA's strike tactics in the present case, to utilize unemployment compensation benefits to aid members in withstanding the financial pressures of a strike and optimize the Union's capacity to maintain a strike.

Shell is similarly engaged in litigation contesting the validity of Washington's payment of unemployment compensation benefits to striking employees. *Shell Oil Co.* v. *Brooks,* No. C74-1935 (W.D. Wash.) That case arose out of a 1973 strike at Shell's Anacortes, Washington facility by employees who were members of the Oil, Chemical and Atomic Workers International Union. In order to maintain production during the strike, temporary arrangements, including the use of supervisory personnel and employee

[1] Initially the State, as it had historically done, disqualified the employees because their unemployment was due to an active "labor dispute." Subsequently, however, the strikers were permitted to "break" the labor dispute disqualification by earning as little as two dollars from an interim employer. Upon being laid off from the interim job, the striking employees reapplied, and thereafter received full benefits for the statutory 26-week period. As a result of this procedure, of the 166 strikers who participated in the Dow Bay City strike, 124 succeeded in circumventing the labor dispute disqualification and received unemployment benefits. Similarly, of the 5,000 employees that struck in March, 1974, at Dow's Midland plant by May, 1974, approximately 2,481 had commenced receiving benefits. On average the benefits received approximated almost 50 percent of each worker's net compensation. Consequently, the State of Michigan disbursed approximately $3,400,000 in the form of unemployment compensation benefits to Dow's striking employees.

transfers from other refineries, were implemented by Shell. Washington, however, permits unemployment compensation benefits to be paid strikers where a strike fails to substantially curtail the struck employer's production. As a result of this policy, which is virtually identical to that of Hawaii presented to this Court in *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.*, 405 F. Supp. 275 (D. Hawaii 1975), *petition for cert. filed* (No. 77-962), all of the Shell strikers received unemployment benefits for the duration of the strike. Again, as in *Hawaii Telephone* and *Dow*, the grant of unemployment benefits was the result of carefully orchestrated union efforts which had the effect of requiring Shell to finance the strike by directly increasing unemployment tax contributions.

The issue presented in the instant case, is therefore, of vital concern to both Dow and Shell as well as a substantial segment of American Industry. This litigation is not confined to the *New York Telephone* controversy; the factual basis and the ultimate effect of the payments made in both the *Shell* and *Dow* cases closely resemble those in the case at bar. Further, various preliminary opinions issued in the *Dow* case (see, e.g., *Dow Chemical Co.* v. *Taylor*, 57 F.R.D. 105 (E.D. Mich. 1972)) have been discussed by the parties in the present case and were in fact relied on by the District Court and the Court of Appeals in the opinions below. See, e.g., App. to Pet. at pps. 7a, 46a, 50a. Thus, the question before the Court—whether the availability of state unemployment compensation benefits to striking employees intrudes into an area left by Congress to the "free play of economic forces" (*Lodge 76, I.A.M.* v. *Wisconsin Employment Rel. Comm.*, 427 U.S. 132 (1976))—is a recurrent question that is of great significance to the *amici*. It is for this reason that they respectfully submit their views to the Court.



## REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Review should be granted in order to resolve a significant and recurrent question, not heretofore decided by this Court, that has engendered considerable confusion in the lower courts, *viz.*, whether the availability of state unemployment compensation benefits to striking employees intrudes into an area left by Congress to the "free play of economic forces." *Lodge 76, I.A.M.* v. *Wisconsin Employment Rel. Comm.*, 472 U.S. 132 (1976). This issue was expressly left open by this Court in *Ohio Bureau of Employment Services* v. *Hodory*, ..... U.S. ....., 45 U.S.L.W. 4544 (Mar. 31, 1977) (No. 75-1707). It is now ripe for resolution and the instant case, as well as the companion petition in *Hawaiian Telephone*, Case No. 77-962, present this Court with appropriate vehicles for its urgently-needed resolution.

### A. This Case Presents A Recurrent Question Of Federal Law Which Has Not Been But Should Be Settled By This Court.

The labor preemption problem in the past has been to determine the extent to which the lower courts were foreclosed from acting by the exclusive administrative jurisdiction of the National Labor Relations Board. See, e.g., *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971); and *Sears, Roebuck and Co.* v. *San Diego Carpenters, cert. granted*, No. 76-750. This historic focus on judicial interference with federally protected or prohibited employee activities has, however, now been recognized to be but one of "two categories" of labor problems. *Lodge 76, I.A.M.* v. *Wisconsin Employment Rel. Comm.*, 427 U.S. 132 (1977). The open issue which must now be ad-

dressed—and an issue of similar magnitude[2]—is the permissible extent of the states' legislative power, albeit perhaps directed at non-labor objectives, to impinge upon federal labor policy. The particular variant of this question that is at issue in this case, state subsidies to strikers, has been a recurrent subject of substantial litigation,[3] and national controversy.[4] It now warrants resolution. The instant case, as well as the companion petition in *Hawaii Telephone*, provide appropriate vehicles for

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[2] See Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337-1339 (1972): "From 1945 to 1960 no aspect of labor-management relations law gave rise to as much litigation and diversity of judicial opinion as the problems of fitting the basic federal labor legislation—the National Labor Relations Act, the Labor Management Relations Act and the Labor-Management Reporting and Disclosure Act—into the surrounding legal system. . . . Today the wind carries scent of change—or at least of reexamination. . . . The occasion seems ripe, therefore, for a review of the development of, and basic issues in, the law pertaining to federal occupation of the field of labor dispute."

[3] See, e.g., the cases cited at page 15 of the Petition, involving the grant of unemployment compensation benefits to strikers, and related litigation, such as *Batterton* v. *Francis*, 45 U.S.L.W. 4768 (June 21, 1977) (No 75-1181), and *ITT Lamp Division* v. *Minter*, 435 F. 2d 989 (1st Cir. 1970), *cert. den.* 402 U.S. 933 (1971), *reh. den.*, 404 U.S. 874 (1971), involving the grant of other forms of public asisstance to strikers.

[4] In *ITT Lamp Division*, for example, eleven states joined in urging this Court to grant review. The position of the states in that case reflected the serious dislocation that then prevailed and still prevails, as a result of the uncertainty existing in this area. Compare, e.g., the position of Iowa in its *amicus brief* in *ITT Lamp Division* in support of the petition for rehearing p. 3 ("the State of Iowa believes that allowing welfare assistance to persons on strike contravenes the Federal statutory scheme manifesting the general policy of free collective bargaining") with that of Massachusetts in its (footnote continued)



such a decision. The records in both cases were aggressively presented, including (1) microcosmic analyses of the strikes which precipitated each case; (2) documentary evidence rgarding the role of unemployment compensation in labor union strike tactics and bargaining strategies elsewhere; (3) the testimony of experienced management and union negotiators, and (4) macrocosmic analyses of the dynamics of labor disputes by expert labor economists and statisticians. With such records, this Court would for the first time be in a position to conduct the requisite "more complicated and perceptive process than is conveyed by the delusive phrase 'ascertaining the intent of the legislature.'" *San Diego Building Trades Council* v. *Garmon*, 359 U.S. at 239-240.

### B. Review By This Court Is Warranted To Resolve A Substantial Conflict Among The Courts Below.

Prior to issuance of the decision below, the lower courts had uniformly concluded that the instant dispute was one in which "the existing legislative record is not sufficiently clear to establish Congressional intent either way", and which could therefore, only be resolved after an empirical evaluation of the factual impact of the disputed state policies upon the federal collective bargaining scheme. *Grinnell*

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(footnote continued)
brief in opposition (p. 5) (". . . the court of appeals [here] reached the only possible conclusion—substantial doubt that a significant frustration of federal collective bargaining policy was effected by the granting of welfare benefits to indigent strikers . . ."). The same difference of opinion continues to exist with regard to the availability of unemployment compensation benefits to strikers, the issue in the instant case.

*Corp.* v. *Hackett,* 475 F. 2d at 454. As the Court observed in *Dow*:

> . . . this court views the issue of supremacy as a mixed question of law and fact. This court does not believe, as defendants and intervenors suggest, that congressional inaction or failure to pass particular amendments to unemployment tax laws results in a definitive statement of congressional intent. Moreover, whether in fact the payment of unemployment compensation infringes an employer's collective bargaining right cannot be decided by this court on the pleadings submitted.

In diametric conflict with those decisions, however, the Second Circuit in the present case has now found Congressional tolerance of state unemployment insurance laws that conflict with the federal labor policy, and concluded that, as a matter of law, the states have been granted unbridled freedom to provide unlimited economic assistance to striking employees as long as that stream of public revenue is labelled as unemployment compensation benefits.

These contrary positions have resulted in an injunction prohibiting strikers from receiving unemployment compensation benefits actually issuing in the state of Hawaii and being possible in the First Circuit, while concurrently no such injunction may issue in the Second Circuit. Such a possibility of differing results on requests for injunctive relief in identical cases has been deemed a particularly appropriate situation for the grant of certiorari. *McCulloch* v *Sociedad Nacional,* 372 U.S. 10, 12 (1973). The continued existence of a conflict on such an important issue of labor-management relations impairs the effective implementation of federal labor policy. Review by this Court is warranted, therefore, to provide guidance to the lower courts and to "spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner* v. *Teamsters Union,* 346 U.S. 485, 488 (1953).



**C. The Decision Below Impermissibly Intrudes On Federal Labor Policy.**

The decision below is contrary to the numerous decisions of the Court which have "made it abundantly clear that state attempts to influence the substantive terms of collective bargaining agreements are . . . inconsistent with the federal regulatory scheme." *Lodge 76, I.A.M.* v. *Wisconsin Employment Rel. Comm.,* 427 U.S. at 140, 177. The use of economic pressure is, of course, "part and parcel" of this federal scheme. *N.L.R.B.* v. *Insurance Agents Int'l Union,* 361 U.S. 477, 495 (1960); *H. K. Porter Co.* v. *N.L.R.B.,* 397 U.S. 99, 108 (1970). "The degree of economic power the parties possess", rather than the "Government . . . control[s] the results of the negotiations." *N.L.R.B.* v. *Insurance Agents Int'l Union,* 361 U.S. at 488, 489. The right to bargain collectively thus clearly contemplates economic warfare, and "does not entail any 'right' to insist on one's position free from economic disadvantage". *American Shipbuilding Co.* v. *N.L.R.B.,* 380 U.S. 300, 309 (1965).

Consistent with these principles, the courts have jealously guarded the process of collective bargaining from state interference. This Court, for example, had repeatedly held that restriction on "either the objectives for which economic pressure can be applied [see *Local 24, International Brotherhood of Teamsters* v. *Oliver,* 358 U.S. 283 (1959)] or the forms of pressure which are permissible [see *Lodge 76, I.A.M.* v. *Wisconsin Employment Rel. Comm., supra; Teamsters Local 20* v. *Morton,* 377 U.S. 252 (1964)] tips the scale toward management or union", and is prohibited. The decision below ignores this careful balance. Where, as here, state action may have a coercive effect, whether direct or indirect, upon the parties to a labor dispute, it is prohibited by overriding federal labor policy.

## CONCLUSION

For each of the foregoing reasons, as well as those set forth in the Petition, the Petition For Writ Of Certiorari should be granted.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUN 12 1978
MICHAEL RODAK, JR., CLERK

# APPENDIX

IN THE

# Supreme Court of the United States

**October Term, 1977**

**No. 77-961**

---

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

—v.—

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., State Commissioner of Taxation & Finance,

*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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**PETITION FOR CERTIORARI FILED JANUARY 4, 1978**
**CERTIORARI GRANTED MARCH 27, 1978**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-961**

---

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

—v.—

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Docket Entries

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 CIV 4557

| DATE | PROCEEDINGS |
|---|---|
| Oct. 24-73 | Filed complaint & issued summons. |
| Dec. 6-73 | Filed summons & ent. marshal's return served on:<br>NY State Dept of Labor by Bertha Diggs on 10-30-73,<br>Norman Gallman unexecuted on 10-30-73,<br>Mario A. Procaccino by J. Fichera on 11-20-73,<br>N.Y. State Dept of Taxation & Finance by I. Nieves on 11-20-73,<br>Louis J. Lefkowitz by Mr. Sattler on 11-19-73,<br>& Louis L. Levine by Bertha Diggs on 10-30-73. |
| Dec. 10-73 | Filed ANSWER of defts to the complaint. |
| 5/22/74 | PRE-TRIAL HELD, OWEN, J. |
| 9/12/74 | P.T.C. HELD |
| Sep. 16-74 | Filed stip & order—All proceedings with respect to the determination of the amount of damages in this case shall be deferred until such time as the constitutional issues are fully resolved by this Court.—Owen, J. |
| Sep. 27-74 | Filed Defts. Notice of Motion & Supporting affidavit. Re: Judgment. ret. 11/1/74. |
| Sep. 27-74 | Filed Defts. Memorandum of Law. |
| Oct. 25-74 | Filed pltff's affdvt in opposition to deft's motion for summary judgment. |

*Docket Entries*

| DATE | PROCEEDINGS |
|---|---|
| Oct. 25-74 | Filed pltffs' memorandum of law in opposition to motion for summary judgment. |
| Nov. 6-74 | Filed Reply Memorandum of Law in support of State Defts. Motion for summary judgment. |
| Jan. 20-75 | Filed Affidavit by Raymond E. Williams in support of pltffs. opposition to defts motion for summary judgment. |
| Mar. 31-75 | Filed MEMORANDUM OPINION #42,125—Defts' motion for summary judgment is denied. So Ordered—Owen, J.—Mailed notices. |
| 6-18-75 | PRE-TRIAL CONFERENCE HELD BY Hartenstine |
| 1-12-75 | PRE-TRIAL CONFERENCE HELD BY HARTENSTINE, U.S. MAG. |
| 12- 9-75 | PTC Held Owen, J. |
| 01-14-76 | Filed revision to Consented Pre-Trial Order ..... Owen, J. |
| 02-26-76 | Before Owen J., non-jury trial begun. |
| 02-27-76 | Trial continued. |
| 03-11-76 | Trial continued. |
| 03-12-76 | Trial continued. |
| 03-15-76 | Trial continued. |
| 03-16-76 | Trial continued. |
| 03-17-76 | Trial continued. |
| 04-02-76 | Trial continued. |
| 04-16-76 | Trial continued & concluded. Decision reserved. |



*Docket Entries*

| DATE | PROCEEDINGS |
|---|---|
| 05-07-76 | Filed transcript of record of proceedings dated Feb. 26, 27, March 11, 12, 15, 1976. |
| 05-07-76 | Filed transcript of record of proceedings dated March 16, 17, April 2, 16, 1976. |
| 06-25-76 | Filed Pltffs'. post-trial memorandum of law. |
| 06-25-76 | Filed Pltffs'. appendices A & B to post-trial memorandum of law. |
| 07-02-76 | Filed Appendices A and B to Pltffs'. post-trial memorandum of law. |
| 07-09-76 | Filed Ptlffs'. proposed findings of fact & conclusions of law. |
| 7-22-76 | Filed Appendix to Dfts. Post Trial Memorandum of Law. |
| 7-22-76 | Filed Dfts. Post Trial Memorandum of Law. |
| 7-22-76 | Filed Dfts. Proposed findings of Fact & Conclusions of law. |
| 08-10-76 | Filed Pltffs'. post-trial reply memorandum of law. |
| 5-24-76 | Filed Opinion #45939. On the basis of the New York Labor Law, on the basis it provides for the payment of unemployment compensation to strikers, is state intervention, causes an employer to finance it's own strikers. It is in conflict with federal labor law policy and is therefore unconstitutional and void under the supremacy clause of the U.S. Constitution..... So ordered.....Owen, J. m/n. |

| DATE | PROCEEDINGS |
|---|---|
| 6-22-77 | Filed deft notice of appeal to the USCA from order of J. Owen dated 5-24-77. m/n |
| 6/27/77 | Filed amended notice of appeal to the USCA form the order of J. Owen dated 5/24/77 by State Defts. m/n |
| 6/27/77 | Filed declaratory judgment and order for permanient injunction declaring Article 18 of the N.Y. Labor Law to the extent it provides for the payment of unemployment compensation to strikers is unconstitutional and void; defts within 8 weeks of entry of this order shall recredit pltff respective unemployment insurance accounts retroactive to 1971 etc. Owen J. Judgment ent. Clerk 6/27/77 m/n |
| 6/28/77 | Filed memo and order . . . I decline to grant a stay pending appeal, I do grant a stay until 2PM on 6'27'77 for purpose of allowing State to apply to Court of Appeals to determine if that Court wihes to grant a stay. So ordered Owen J. m/n |
| 7- 8-77 | Filed Stipulation Designating Certain Documents & Exhibits to Become Part of Record on Appeal. |
| 7- 8-77 | Filed notice of transmission of record to USCA. |
| 7-22-77 | Filed supplemental record on appeal with USCA |
| 8-31-77 | Filed transcript of record of proceedings dated 6-9-77 |



| DATE | PROCEEDINGS |
|---|---|
| 12-16-77 | Filed True Copy of U.S.C.A. Mandate with opinion attached. Ordered that judgment of district court is reversed & the action is remanded with instruction to dismiss the complaint in accordance with the opinion of this court with costs to be taxed against the appellees. Docketed as a Judgment #78,376 on 12-19-77 sent to Aponte. |

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## UNITED STATES COURT OF APPEALS

For the Second Circuit

77-7337

| DATE | PROCEEDINGS |
|---|---|
| 6-23-77 | Filed copies of docket entries and notice of appeal (Defendants) |
| 6-27-77 | Filed motion for stay, appellant, p/s |
| 6-27-77 | Filed order granting appellants' motion for a stay to the extent that that the judgment and order of the district court are stayed until 6-30-77 at which time the motion for a stay will be heard at 10:30 A.M. in Room 1705 |
| 6-28-77 | Filed copies of docket entries and amended notice of appeal |
| 6-30-77 | Filed order granting motion for stay. Appellant's brief by 7-8-77; reply brief, if any, by 7-18-77; appellees' brief by 7-14-77; joint appendix by 7-14-77; argument of appeal shall |

| DATE | PROCEEDINGS |
|---|---|
| | be set for the week of 7-18-77; all papers may be in tw form |
| 7- 8-77 | Filed record (Original papers of district court) |
| 7-11-77 | Filed briefs, appellant, p/s |
| 7-13-77 | Filed briefs, amicus curiae, p/s (N.Y.S., AFL-CIO) |
| 7-15-77 | Filed briefs, amicus curiae, p/s (Rochester Telephone Corp., et al.) |
| 7-15-77 | Filed briefs, amicus curiae, p/s (Dow Chemical Co.) |
| 7-15-77 | Filed supplemental record (Original papers of district court) |
| 7-18-77 | Filed briefs, appellee, p/s |
| 7-18-77 | Filed appendix, appellee, p/s |
| 7-18-77 | Filed four volumes of joint appendix, appellant, p/s (Vol. I. —10 copies, Vol. II, III, IV—four copies) |
| 7-19-77 | Filed reply briefs, appellant, p/s |
| 7-19-77 | Filed briefs, amicus curiae, p/s (Local 1, etc.) |
| 7-19-77 | Filed final briefs, appellee, p/s |
| 7-20-77 | Filed briefs, amicus curiae, p/s (District 65, et al.) |
| 7-22-77 | Argument heard (By: Meskill, C.J., Van Pelt Bryan, Stewart, DJJ) |



| DATE | PROCEEDINGS |
|---|---|
| 7-22-77 | Filed second supplemental record (Original papers of district court) |
| 7-22-77 | Filed order granting motion to continue stay now in effect pending determination of the appeal |
| 11- 9-77 | Judgment reversed and remanded with instructions to dismiss the complaint, Meskill, C.J. |
| 11- 9-77 | Filed judgment. |
| 12- 9-77 | Filed order denying motion for clarification of stay granted by this court pending determination of the appeal |
| 12- 9-77 | Filed order denying motion to stay issuance of the mandate pending application to the Supreme Court of the U.S. for a writ of certiorari pursuant to Rule 41(b) of FRAP |
| 12- 9-77 | Filed order denying motion for a stay |
| 12-12-77 | Issued mandate (opinion, judgment and statement of costs) |
| 12-20-77 | Original, supplemental and second supplemental record returned to district court |
| 1- 9-78 | Filed notice of filing of petition for writ of certiorari (77-961) |
| 3-31-78 | Filed certified copy of order from Supreme Court granting petition for writ of certiorari |

**Summons**

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 73 Civ. 4557

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Plaintiffs,*

—v.—

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and NORMAN GALLMAN, State Commissioner of Taxation & Finance,

*Defendants.*

To the above named Defendants:

You are hereby summoned and required to serve upon Aranow, Brodsky, Bohlinger, Benetar, Einhorn & Dann, plaintiffs' attorney, whose address 469 Fifth Avenue, New York, New York 10017, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

RAYMOND F. BURGHARDT
*Clerk of Court.*

E. A. BECKER
*Deputy Clerk.*

Date: October 24, 1973



**Complaint**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4557

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Plaintiffs,*

—against—

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and NORMAN GALLMAN, State Commissioner of Taxation & Finance,

*Defendants.*

The plaintiffs, by their attorneys, Aranow, Brodsky, Bohlinger, Benetar, Einhorn & Dann, complaining of defendants, respectfully allege:

1. This action arises under the Supremacy Clause of the Constitution of the United States, Article VI, Clause 2, under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and under the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §151 et seq. ("LMRA"), an act of Congress regulating commerce. It seeks, among

other relief, to declare invalid and enjoin the application of Article 18 of the New York Labor Law insofar as unemployment insurance benefits thereunder are provided to striking employees. This court has jurisdiction of the action under 28 U.S.C. § 1331, 28 U.S.C. § 1337, and 28 U.S.C. §§ 2201 and 2202; and the matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars ($10,000.00) in respect to each of the plaintiffs.

AS A FIRST CAUSE OF ACTION:

2. Plaintiff New York Telephone Company ("TELCO") is a domestic corporation organized and existing under the laws of the State of New York with its principal place of business in the Southern District of New York.

3. The Bell System is a descriptive term commonly understood in the telephone industry, both by employers and unions, as encompassing telephone operating and other companies, including among others TELCO, Western Electric Company ("WECO"), the Long Lines Department of the American Telephone and Telegraph Company ("AT&T") and the Empire City Subway Company (Limited) ("Empire").

4. Defendant Louis L. Levine is the Industrial Commissioner of the New York State Department of Labor ("the Industrial Commissioner"). The Industrial Commissioner has an office in the Southern District of New York for the conduct of official business.



5. The Industrial Commissioner is charged under the laws of the State of New York with the administration of Article 18 of the New York Labor Law ("the Unemployment Insurance Law"). Included among his duties is directing disbursements from the Unemployment Insurance Fund for the payment of benefits to certain striking employees among other claimants.

6. Defendant Norman Gallman is the State Commissioner of Taxation and Finance and, as such, heads the New York State Department of Taxation and Finance. The State Commissioner of Taxation and Finance has an office in the Southern District of New York for the conduct of official business.

7. The State Commissioner of Taxation and Finance is designated under the Unemployment Insurance Law as custodian of the funds requisitioned by the Industrial Commissioner for use in the payment of unemployment insurance benefits to certain striking employees among other claimants.

8. TELCO is an employer subject to the Unemployment Insurance Law and is required thereunder to pay unemployment insurance taxes on compensation paid to its employees.

9. TELCO is also subject to the LMRA and is obligated to bargain collectively, among others, in a New York statewide unit wherein the Communications Workers of Amer-

ica ("CWA" or "International Union") is the certified bargaining representative of certain non-supervisory employees of TELCO and of Empire, its wholly owned subsidiary, including all those employed in TELCO's plant and engineering departments.

10. The collective bargaining agreement entered into in 1968 between CWA and TELCO and Empire was scheduled to expire on July 28, 1971, upon the giving of prior notice. Such notice was given by CWA on or about May 24, 1971 and negotiations for a new contract commenced on July 6, 1971.

11. CWA has labor contracts with various companies in the Bell System throughout the United States in addition to TELCO and Empire. In 1971, as in previous negotiations, the CWA International and the Bell System companies bargained on a pattern basis, with the WECO negotiations selected as one of the two patternmaking negotiations in that year. In such negotiations, once agreement is reached between the CWA International and the patternmaker, settlement usually follows in all CWA bargaining units at all Bell System companies.

12. In the spring of 1971 the various collective bargaining agreements between CWA and the several companies of the Bell System were due to expire on different dates; the earliest was the contract covering WECO installers which expired on April 30, 1971. The agreements which expired prior to July 14, 1971 had been extended on a day-by-day basis to July 14, 1971. As of July 14, 1971,



collective bargaining in connection with new contracts had been in process between CWA and several of the Bell System companies.

13. On July 14, 1971 a nationwide strike by all 500,000 CWA-represented employees was commenced by the International Union against all Bell System companies including TELCO and Empire whose joint contract with CWA had not yet expired.

14. On July 18, 1971 agreements were reached subject to ratification between CWA and the various Bell System companies, including TELCO and Empire, and the CWA ordered all striking employees back to work on or about July 21, 1971.

15. Substantially all of the striking employees of the various Bell System companies throughout the country returned to work on or about July 21, 1971.

16. On and after July 21, 1971 CWA-represented employees of the various Bell System companies in New York continued to stay away from their jobs at the direction of their local unions notwithstanding the order of the International Union that they return to work.

17. On August 14, 1971, the respective agreements between CWA and the various Bell System companies, with the exception of TELCO and Empire, were ratified by the covered employees. The TELCO and Empire employees rejected the contract negotiated on their behalf

notwithstanding the recommendation of the International Union to ratify it.

18. TELCO and Empire employees thereafter continued to strike.

19. On February 16, 1972, CWA-represented employees at TELCO and Empire voted to ratify a contract between CWA and their respective employers. On February 17, 1972, a strike settlement agreement covering both Empire and TELCO was reached providing that all CWA-represented employees would return to work on February 18, 1972.

20. The New York State phase of the aforementioned CWA strike against the Bell System was illegal and was so declared by the respective Administrative Law Judges in two separate cases now pending before the National Labor Relations Board (Case #2-CB-5172 and Case #3-CB-1851-11).

21. Section 592.1 of the Unemployment Insurance Law is entitled "Suspension of Accumulation of Benefit Rights" and provides:

> "Industrial controversy. The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of



> such seven weeks beginning with the day after such strike, lockout, or other industrial controversy was terminated."

22. During the period of the strike TELCO strikers applied for unemployment insurance benefits and such benefits were granted after the seven-week suspension period provided in Section 592.1 of the Unemployment Insurance Law over the objections of TELCO.

23. Upon information and belief payments of these benefits were made to upwards of 30,000 TELCO employees.

24. The aforementioned payments were made in violation of the United States Constitution under a state statute which conflicts with the federal labor policy established by Congress in the LMRA.

25. The said payment of benefits to the strikers constituted state subsidization of the strike and, upon information and belief, prolonged the strike against TELCO. The strikers were thereby supplied with financial support for their insistence upon and holding out for a settlement which was larger than and different from the one originally negotiated on their behalf by CWA, recommended by that union for adoption and accepted by all of the CWA-represented Bell System employees throughout the United States outside of New York.

26. This unlawful state subsidy amounted to a maximum of $75.00 per week net to each benefited employee.

27. During the 1971-72 strike of TELCO employees about $43,000,000 in benefits were paid to TELCO strikers and charged against TELCO's individual account in the Unemployment Insurance Fund.

28. The balance in TELCO's individual account in September, 1971 prior to the payment of benefits to the strikers was approximately $40,800,000 whereas the account balance as computed in March, 1972 after the strike ended showed a negative balance of about $1,600,000.

29. As a result of the unemployment insurance payments to strikers TELCO'S unemployment insurance normal tax rate increased from 0.9% in 1971, one of the lowest possible tax rates, to 2.3% in 1972, the highest tax rate possible in 1972 for a positive account employer, and to 2.8% in 1973. Upon information and belief, had the aforementioned benefits to strikers not been paid, TELCO's unemployment insurance normal tax rate would have been 0.8% in 1972.

30. The aforesaid increase in its unemployment insurance normal tax rate has caused TELCO to suffer damages in the amount of approximately $6,300,000 through increased unemployment insurance tax payments in 1972. TELCO, unless granted the relief herein prayed for, will be damaged by the additional amount of approximately $9,300,000 in 1973 and thereafter will continue to be damaged by higher unemployment insurance tax payments for many years.



31. Upon information and belief, the payment of benefits pursuant to Section 592.1 of the Unemployment Insurance Law prolonged the strike and severely burdened certain aspects of telephone service, including the repair, maintenance and installation of telephone equipment.

32. The LMRA guarantees to parties covered thereby the right to engage in free collective bargaining without state interference or state subsidization of any party as against another.

33. The payment by defendants of unemployment insurance benefits pursuant to Section 592.1 of the Unemployment Insurance Law deprived TELCO of said right, frustrated substantially the federal policy of free collective bargaining, constituted an unlawful intrusion by the State of New York into an area preempted by the LMRA, and forced TELCO into financing a strike against itself—all in violation of the Supremacy Clause, Article VI, Clause 2, of the United States Constitution. Consequently, TELCO has suffered irreparable injury for which there is no adequate remedy at law.

AS A SECOND CAUSE OF ACTION:

34. Plaintiff WECO is a domestic corporation organized and existing under the laws of the State of New York with its principal place of business in the Southern District of New York.

35. Plaintiff WECO repeats and realleges each and every allegation in paragraphs "3", "4", "5", "6", and "7" of this complaint; and further alleges:

36. WECO is an employer subject to the Unemployment Insurance Law and is required thereunder to pay unemployment insurance taxes on compensation paid to its employees.

37. WECO is subject to the LMRA and is obligated to bargain collectively with CWA, the certified bargaining representative of certain of its employees.

38. WECO installers, job clerks and service center employees are represented exclusively by CWA in separate nationwide bargaining units. Collective bargaining between WECO and its employees is conducted on a nationwide basis by CWA.

39. The agreement between the installers and WECO due to expire on April 30, 1971, was extended on a day-by-day basis subject to termination by giving 24-hours written notice. Such notice was given by CWA on June 12, 1971 and collective bargaining negotiations ensued.

40. Plaintiff WECO repeats and realleges each and every allegation in paragraphs "11" and "12" of this complaint.

41. On July 14, 1971 CWA commenced a nationwide strike against all Bell System companies including WECO.



42. On July 18, 1971 CWA and WECO entered into a collective bargaining agreement subject to ratification. CWA's Executive Board voted to terminate the strike pending such ratification and ordered all striking employees back to work on or about July 21, 1971.

43. Substantially all of the striking employees at WECO throughout the country returned to work on or about July 21, 1971, except those in New York State.

44. On and after July 21, 1971 substantially all CWA-represented employees at WECO in New York State, except manufacturing employees, continued to stay away from their jobs, notwithstanding the order of the International Union that they return to work.

45. On August 14, 1971 CWA-represented employees at WECO in New York and elsewhere in the nation ratified new collective bargaining agreements which were not due to expire until 1974.

46. Each such agreement contained a no-strike clause which provided:

> "No officer, representative or member of the Union shall authorize, instigate, condone or engage in a strike, work stoppage or interruption of work operations, including absences to attend Union meetings that would have the same effect as a strike or work stoppage, during the period of this contract."

47. After August 14, 1971, notwithstanding the ratification of said agreements, the termination of the strike by CWA and the return to work of all of its members employed by WECO elsewhere, substantially all WECO employees in New York State, except those in manufacturing, continued to stay away from their jobs.

48. Such striking employees returned to work after termination of the TELCO strike on or about February 17, 1972.

49. Plaintiff WECO repeats and realleges each and every allegation in paragraph "21" of this complaint.

50. During the period of the strike WECO strikers applied for unemployment insurance benefits and such benefits were granted after the seven-week suspension period provided in Section 592.1 of the Unemployment Insurance Law over the objections of WECO.

51. Upon information and belief, payments of these benefits were made to upwards of 4,500 WECO employees.

52. The aforementioned payments were made in violation of the United States Constitution under a state statute which conflicts with the federal labor policy established by Congress in the LMRA.

53. The said payment of benefits to the strikers constituted state subsidization of the strike and, upon information and belief, prolonged the strike against WECO.



The strikers were thereby supplied with financial support for their insistence upon and holding out for a settlement which was larger than and different from the one originally negotiated on their behalf by CWA, recommended by that union for adoption and accepted by all of the CWA-represented Bell System employees throughout the United States outside of New York.

54. Plaintiff WECO repeats and realleges each and every allegation in paragraph "26" of this complaint.

55. During the 1971-72 strike of WECO employees, about $5,000,000 in benefits were paid to WECO strikers and charged against WECO's individual account in the Unemployment Insurance Fund.

56. The balance in WECO's individual account in September, 1971 prior to the payment of benefits to the strikers was approximately $6,400,000, whereas the account balance as computed in March, 1972 after the strike ended showed a balance of about $1,700,000.

57. As a result of the unemployment insurance payments to strikers, WECO's unemployment insurance normal tax rate increased from 0.7% in 1971, the lowest possible normal tax rate in that year, to 2.1% in 1972, one of the highest tax rates possible in 1972 for a positive account employer, and to 2.5% in 1973. Upon information and belief, had the aforementioned benefits to strikers not been paid, WECO's unemployment insurance normal tax rate would have been 0.7% in 1972.

58. The aforesaid increase in its unemployment insurance normal tax rate has caused WECO to suffer damages in the amount of approximately $900,000 through increased unemployment insurance tax payments in 1972. WECO, unless granted the relief herein prayed for, will be damaged by the additional amount of approximately $1,200,000 in 1973 and thereafter will continue to be damaged by higher unemployment insurance tax payments for many years.

59. Plaintiff WECO repeats and realleges each and every allegation in paragraph "31" of this complaint.

60. The LMRA guarantees to parties covered thereby the right to engage in free collective bargaining without state interference or state subsidization of any party as against another.

61. The payment by defendants of unemployment insurance benefits pursuant to Section 592.1 of the Unemployment Insurance Law deprived WECO of said right, frustrated substantially the federal policy of free collective bargaining, constituted an unlawful intrusion by the State of New York into an area preempted by the LMRA, and forced WECO into financing a strike against itself—all in violation of the Supremacy Clause, Article VI, Clause 2, of the United States Constitution. Consequently, WECO has suffered irreparable injury for which there is no adequate remedy at law.



AS A THIRD CAUSE OF ACTION:

62. Plaintiff AT&T is a domestic corporation organized and existing under the laws of the State of New York with its principal place of business in the Southern District of New York.

63. Plaintiff AT&T repeats and realleges each and every allegation in paragraphs "3", "4", "5", "6", and "7" of this complaint; and further alleges:

64. AT&T is an employer subject to the Unemployment Insurance Law and is required thereunder to pay unemployment insurances taxes on compensation paid to its employees.

65. AT&T is subject to the LMRA and is obligated thereunder to bargain collectively with CWA, the certified bargaining representative of certain of its employees.

66. The collective bargaining agreement between AT&T and CWA was due to expire on July 16, 1971. CWA notified AT&T of its desire to terminate that agreement and negotiations began on a new agreement on or about June 4, 1971.

67. Plaintiff AT&T repeats and realleges each and every allegation contained in paragraphs "11" and "12" of this complaint.

68. On July 14, 1971 CWA-represented employees struck AT&T as authorized by a nationwide strike vote of all

CWA-represented employees employed by Bell System companies.

69. On July 18, 1971 CWA reached an agreement with AT&T and the CWA Executive Board voted to terminate the strike pending ratification thereof and ordered the employees back to work on or about July 21, 1971.

70. Substantially all of the CWA-represented employees at AT&T throughout the country returned to work on or about July 21, 1971.

71. Certain AT&T employees in New York State refused to return to work.

72. On August 14, 1971 CWA-represented employees at AT&T ratified the new agreement negotiated on their behalf.

73. After August 14, 1971, notwithstanding the ratification of said agreement, the termination of the strike by CWA and the return to work of substantially all of its members employed at AT&T, certain CWA-represented employees at AT&T in New York continued to remain away from their jobs.

74. Many of such striking employees remained away from work until the termination of the TELCO strike on or about February 17, 1972.

75. Plaintiff AT&T repeats and realleges each and every allegation in paragraph "21" of this complaint.



76. During the period of the strike AT&T strikers applied for unemployment insurance benefits and such benefits were granted after the seven-week suspension period provided in Section 592.1 of the Unemployment Insurance Law over the objections of AT&T.

77. Upon information and belief, payments of these benefits were made to approximately 300 AT&T employees.

78. The aforementioned payments were made in violation of the United States Constitution under a state statute which conflicts with the federal labor policy established by Congress in the LMRA.

79. The said payment of benefits to the strikers constituted state subsidization of the strike and, upon information and belief, prolonged the strike against AT&T. The strikers were thereby supplied with financial support for their insistence upon and holding out for a settlement which was larger than and different from the one originally negotiated on their behalf by CWA, recommended by that union for adoption and accepted by all of the CWA-represented Bell System employees throughout the United States outside of New York.

80. Plaintiff AT&T repeats and realleges each and every allegation in paragraph "26" of this complaint.

81. During the 1971-72 strike of AT&T employees about $470,000 in benefits were paid to AT&T strikers and charged against AT&T's individual account in the Unemployment Insurance Fund.

82. The balance in AT&T's individual account in September, 1971 prior to the payment of benefits to the strikers was approximately $5,600,000, whereas the account balance as computed in March, 1972 after the strike ended showed a balance of about $5,000,000.

83. As a result of the unemployment insurance payments to strikers, AT&T's unemployment insurance normal tax rate increased from 0.8% in 1971, one of the lowest possible normal tax rates, to 1.0% in 1972 and to 0.9% in 1973. Upon information and belief, had the aforementioned benefits to strikers not been paid, AT&T's unemployment insurance normal tax rate would have been 0.9% in 1972.

84. The aforesaid increase in its unemployment insurance normal tax rate has caused AT&T to suffer damages in the amount of approximately $60,000 through increased unemployment insurance tax payments in 1972. AT&T, unless granted the relief herein prayed for, will be damaged by the additional amount of approximately $130,000 in 1973 and thereafter will continue to be damaged by higher unemployment insurance tax payments for many years.

85. Plaintiff AT&T repeats and realleges each and every allegation in paragraph "31" of this complaint.

86. The LMRA guarantees to parties covered thereby the right to engage in free collective bargaining without state interference or state subsidization of any party as against another.



87. The payment by defendants of unemployment insurance benefits pursuant to Section 592.1 of the Unemployment Insurance Law deprived AT&T of said right, frustrated substantially the federal policy of free collective bargaining, constituted an unlawful intrusion by the State of New York into an area preempted by the LMRA, and forced AT&T into financing a strike against itself—all in violation of the Supremacy Clause, Article VI, Clause 2, of the United States Constitution. Consequently, AT&T has suffered irreparable injury for which there is no adequate remedy at law.

AS A FOURTH CAUSE OF ACTION:

88. Plaintiff Empire is a domestic corporation organized and existing under the laws of the State of New York with its principal place of business in the Southern District of New York.

89. Plaintiff Empire repeats and realleges each and every allegation in paragraphs "3", "4", "5", "6" and "7" of this complaint; and further alleges:

90. Empire is an employer subject to the Unemployment Insurance Law and is required thereunder to pay unemployment insurance taxes on compensation paid to its employees.

91. Empire is subject to the LMRA and is obligated to bargain collectively with CWA, the certified bargaining representative of its non-supervisory employees.

92. Collective bargaining for represented Empire employees is conducted with CWA in multi-employer negotiations involving TELCO and Empire, resulting in a single collective bargaining agreement covering the CWA-represented employees of both employers.

93. Plaintiff Empire repeats and realleges each and every allegation in paragraphs "10", "11", "12", "13", "14", "15" "16" "17" "18" "19", and "21" of this complaint.

94. During the period of the strike Empire strikers applied for unemployment insurance benefits and such benefits were granted after the seven-week suspension period provided in Section 592.1 of the Unemployment Insurance Law over the objections of Empire.

95. Upon information and belief payments of these benefits were made to upwards of approximately 150 Empire employees.

96. The aforementioned payments were made in violation of the United States Constitution under a state statute which conflicts with the federal labor policy established by Congress in the LMRA.

97. The said payment of benefits to the strikers constituted state subsidization of the strike and, upon information and belief, prolonged the strike against Empire. The strikers were thereby supplied with financial support for their insistence upon and holding out for a settlement which was larger than and different from the one originally



negotiated on their behalf by CWA, recommended by that union for adoption and accepted by all of the CWA-represented Bell System employees throughout the United States ouside of New York.

98. Plaintiff Empire repeats and realleges each and every allegation in paragraph "26" of this complaint.

99. During the 1971-72 strike of Empire employees approximately $103,000 in benefits were paid to Empire strikers and charged against Empire's individual account in the Unemployment Insurance Fund.

100. The balance in Empire's individual account in September, 1971 prior to the payment of benefits to the strikers was approximately $119,000 whereas the account balance as computed in March, 1972 after the strike ended showed a balance of about $27,000.

101. As a result of the unemployment insurance payments to strikers, Empire's unemployment insurance normal tax rate increased from 1.7% in 1971 to 2.3% in 1972, the highest tax rate possible in 1972, and 2.7% in 1973. Upon information and belief, had the aforementioned benefits to strikers not been paid, Empire's unemployment insurance normal tax rate would have been 1.5% in 1972.

102. The aforesaid increase in its unemployment insurance tax rate has caused Empire to suffer damages in the amount of upwards of $13,000 through increased unemployment insurance tax payments in 1972. Empire, unless

granted the relief herein prayed for, will be damaged by the additional amount of upwards of $23,000 in 1973 and thereafter will continue to be damaged by higher unemployment insurance tax payments for many years.

103. Plaintiff Empire repeats and realleges each and every allegation in paragraph "31" of this complaint.

104. The LMRA guarantees to parties covered thereby the right to engage in free collective bargaining without state interference or state subsidization of any party as against another.

105. The payment by defendants of unemployment insurance benefits pursuant to Section 592.1 of the Unemployment Insurance Law deprived Empire of said right, frustrated substantially the federal policy of free collective bargaining, constituted an unlawful intrusion by the State of New York into an area preempted by the LMRA, and forced Empire into financing a strike against itself—all in violation of the Supremacy Clause, Article VI, Clause 2, of the United States Constitution. Consequently, Empire has suffered irreparable injury for which there is no adequate remedy at law.

AS A FIFTH CAUSE OF ACTION:

106. Plaintiffs repeat and reallege each and every allegation in paragraphs "2" through "105" of this complaint; and further allege:

107. Plaintiffs, by virtue of the payment of unemployment insurance benefits to strikers, have suffered the imposition of large debits to their respective unemployment insurance accounts as well as the levying against each of them of vastly increased unemployment insurance taxes. Thereby each of the plaintiffs has been and is being deprived of their property without due process of law in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.



AS A SIXTH CAUSE OF ACTION:

108. Plaintiffs repeat and reallege each and every allegation in paragraphs "2" through "105" of this complaint; and further allege:

109. The payment of unemployment insurance benefits to strikers pursuant to Section 592.1 of the Unemployment Insurance Law is an unreasonable and arbitrary classification of strikers as distinguished from other claimants voluntarily unemployed in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

1. That Section 592.1 of the Unemployment Insurance Law, providing for payment of benefits to strikers after the seventh week of a strike, be declared unconstitutional on the grounds that it violates the Supremacy Clause of Article VI, Clause 2 of the United States Constitution and the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

2. That the court issue a permanent injunction enjoining defendants, their successors in office, agents, employees, and all other persons attempting or purporting to do so, from interfering with the parties' collective bargaining relationships and their right to engage in free collective bargaining without unlawful state subsidization of either party.

3. That the court issue a permanent injunction enjoining the defendants, their successors in office, agents, employees, and all other persons attempting or purporting to do so, from (a) enforcing Section 592.1 of the Unemployment Insurance Law, (b) authorizing the payment of unemployment insurance benefits to strikers and (c) drawing vouchers on the accounts maintained to effectuate the payment of such benefits.

4. That the court issue a permanent injunction requiring the defendants, their successors in office, agents, employees, and all other persons empowered to do so, to recredit plaintiffs' respective unemployment insurance accounts, retroactive to the commencement of benefit payments to strikers in 1971, for the amounts paid out in unemployment insurance benefits as a result of the 1971-1972 strike and requiring them to readjust plaintiffs' unemployment insurance normal tax rates for each and every year since 1971 in light of such credits.

5. That the court award plaintiffs recoupment of the monies which have and will have been paid as increased unemployment insurance tax payments under the increased



normal tax rates which became effective on and after January 1, 1972.

6. That the plaintiffs may recover interest according to law and the costs of this action.

7. That the plaintiffs be granted such other and further relief as the court may deem just and proper.

ARANOW, BRODSKY, BOHLINGER
BENETAR, EINHORN & DANN

By DAVID L. BENETAR
A Member of the Firm
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New York, New York 10017
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**Answer**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4557

Judge Griesa

---

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Plaintiffs,*

—against—

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and NORMAN GALLMAN, State Commissioner of Taxation & Finance,

*Defendants.*

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The defendants for their answer to the complaint:

1. Deny so much of paragraph "1" as alleges that any provision of Article 18 of the New York Labor Law is for any reason invalid and deny further so much of that paragraph as alleges that this Court has jurisdiction of the action.



*Answer*

2-3. Deny knowledge or information sufficient to form a belief as to the allegations of paragraphs "2" and "3".

4. Admit the allegations of paragraph "4".

5. Admit the allegations of the first sentence of paragraph "5" and admit the allegations of the second sentence of that paragraph insofar as it alleges that the Industrial Commissioner directs the distribution of unemployment insurance benefits to eligible claimants.

6. Deny the allegation of the first sentence of paragraph "6" and allege that Mario Procaccino is the State Commissioner of Taxation and Finance. Admit the allegations of the second sentence of paragraph "6".

7. Admit the allegations of paragraph "7" insofar as they state that the State Commissioner of Taxation and Finance is designated under the Unemployment Insurance Law as custodian of the funds requisitioned by the Industrial Commissioner for payment to eligible claimants.

8. Admit the allegations of paragraph "8" insofar as they state that TELCO is an employer subject to the Unemployment Insurance Law and is required thereunder to pay unemployment insurance taxes and allege that these taxes are paid on certain wages pursuant to New York Labor Law, § 570.

9. Deny knowledge or information sufficient to form a belief as to the allegations of paragraph "9".

*Answer*

10-12. Deny knowledge or information sufficient to form a belief as to the allegations of paragraphs "10", "11" and "12".

13. Admit, upon information and belief, the allegations of paragraph "13" except deny knowledge or information sufficient to form a belief as to the number of employees involved.

14. Admit, upon information and belief, the allegations of paragraph "14" except deny knowledge or information sufficient to form a belief as to whether the CWA ordered all striking employees back to work on or about July 21, 1971.

15-16. Deny knowledge or information sufficient to form a belief as to the allegations of paragraphs "15" and "16".

17. Admit, upon information and belief, the allegations of paragraph "17".

18. Admit, upon information and belief, the allegations of paragraph "18" except deny knowledge or information sufficient to form a belief as to the number of employees who continued the strike.

19. Admit, upon information and belief, the allegations of paragraph "19".

20. Deny knowledge or information sufficient to form a belief as to the allegations of paragraph "20".



*Answer*

21. With respect to the allegations of paragraph "21" respectfully refer the Court to the appropriate published statute.

22. Admit the allegations of paragraph "22" except deny knowledge or information sufficient to form a belief as to the percentage of TELCO employees who applied for and who received unemployment insurance.

23. Deny the allegations of paragraph "23" and allege that approximately 28,000 TELCO employees were paid unemployment insurance.

24-26. Deny the allegations of paragraphs "24" to "26".

27. Admit the allegations of paragraph "27" insofar as they state that during the 1971-72 strike of TELCO employees, about $43,000,000 in benefits were paid to TELCO strikers and otherwise respectfully refer the Court to New York Labor Law, § 581.

28. Admit the allegations of paragraph "29" except allege that the balance shown in the TELCO account in September, 1971 was $41,210,497.61 and that the balance shown in March, 1972 was a negative balance of $1,351,194.75 and further allege that balances in an employer's account established pursuant to New York Labor Law, § 581.1(d) do not reflect cash available but reflect a balance for the computation of tax rates.

29. Deny the allegations of paragraph "29" except admit that the tax rates set forth in the first sentence thereof are accurate.

30-31. Deny the allegations of paragraphs "30" and "31".

32. Deny the allegations of paragraph "32" and respectfully refer the Court to the applicable statute.

33. Deny the allegations of paragraph "33".

34. Deny knowledge or information sufficient to form a belief as to the allegations of paragraph "34".

35. With respect to paragraph "35" repeat and realleges each and every response in paragraphs "3", "4", "5", "6", and "7" of this answer to paragraphs "3", "4", "5", "6" and "7" of the complaint.

36. Admit the allegations of paragraph "36" insofar as they state that WECO is an employer subject to the Unemployment Insurance Law and is required thereunder to pay unemployment insurance taxes and allege that these taxes are paid on certain wages pursuant to New York Labor Law, § 570.

37. Deny knowledge or information sufficient to form a belief as to the allegations of paragraph "37".

38-39. Deny knowledge or information sufficient to form a belief as to the allegations of paragraphs "38" and "39".

40. With respect to paragraph "40" repeat and reallege each and every response in paragraphs "11" and "12" of this answer to paragraphs "11" and "12" of the complaint.

41. Admit, upon information and belief, the allegations of paragraph "41".



42. Admit, upon information and belief, the allegations of paragraph "42" except deny knowledge or information sufficient to form a belief as to whether the CWA ordered all striking employees back to work on or about July 21, 1971.

43-44. Deny knowledge or information sufficient to form a belief as to the allegations of paragraphs "43" and "44".

45-46. Deny knowledge or information sufficient to form a belief as to the allegations of paragraphs "45" and "46".

47. Deny knowledge or information sufficient to form a belief as to the allegations of paragraph "47" except admit that after August 14, 1971 many WECO employees stayed away from work.

48. Deny knowledge or information sufficient to form a belief as to the allegations of paragraph "48".

49. With respect to paragraph "49" repeat and reallege each and every response in paragraph "21" of this answer to paragraph "21" of the complaint.

50. Admit the allegations of paragraph "50" insofar as they assert that many WECO employees applied for and were granted unemployment insurance benefits over WECO's objection.

51. Admit the allegations of paragraph "51" except allege that benefits were paid to 3,800 WECO employees.

52-53. Deny the allegations of paragraphs "52" and "53".

54. With respect to paragraph "54" repeat and reallege each and every response in paragraph "26" of this answer to paragraph "26" of the complaint.

55. Deny the allegations of paragraph "55" except admit that during the period in question about $5 million was paid to WECO employees and charged in accordance with the provisions of New York Labor Law, § 581.

56. Deny the allegations of paragraph "56" except admit that during the period in question there was a reduction of about $5 million in the account balance of WECO.

57. Deny the allegations of paragraph "57" except admit that the tax rates set forth in the first sentence thereof are accurate.

58. Deny the allegations of paragraph "58".

59. With respect to paragraph "59" repeat and reallege each and every response in paragraph "31" of this answer to paragraph "31" of the complaint.

60. Deny knowledge or information sufficient to form a belief as to the allegations of paragraph "60".

61. Deny the allegations of paragraph "61".

62. Deny knowledge or information sufficient to form a belief as to the allegations of paragraph "62".

63. With respect to paragraph "63" repeat and reallege each and every response in paragraphs "3", "4", "5", "6"



and "7" of this answer to paragraphs "3", "4", "5", "6" and "7" of the complaint.

64. Admit the allegations of paragraph "64" insofar as they state that A T & T is an employer subject to the Unemployment Insurance Law and is required thereunder to pay unemployment insurance taxes and allege that these taxes are paid on certain wages pursuant to New York Labor Law, § 570.

65-66. Deny knowledge or information sufficient to form a belief as to the allegations of paragraphs "65" and "66".

67. With respect to paragraph "67" repeat and reallege each and every response in paragraphs "11" and "12" of this answer to paragraphs "11" and "12" of the complaint.

68-69. Admit, upon information and belief, the allegations of paragraphs "68" and "69".

70. Deny knowledge or information sufficient to form a belief as to the allegations of paragraph "70".

71-72. Admit, upon information and belief, the allegations of paragraphs "71" and "72".

73. Deny knowledge or information sufficient to form a belief as to the allegations of paragraph "73" except admit that after August 14, 1971 certain A T & T employees in New York remained away from their jobs.

74. Deny the allegations of paragraph "74" except admit that some A T & T employees remained away from their jobs until on or about February 17, 1972.

*Answer*

75. With respect to paragraph "75" repeat and reallege each and every response in paragraph "21" of this answer to paragraph "21" of the complaint.

76. Admit the allegations of paragraph "76" insofar as they assert that some A T & T employees applied for and were granted unemployment insurance benefits over A T & T's objection.

77. Admit the allegations of paragraph "77" except allege that benefits were paid to approximately 400 A T & T employees.

78-79. Deny the allegations of paragraphs "78" and "79".

80. With respect to paragraph "80" repeat and reallege each and every response in paragraph "26" of this answer to paragraph "26" of the complaint.

81. Deny the allegations of paragraph "81" except admit that during the period September 12, 1971 to February 27, 1972 unemployment insurance benefits were paid to A T & T employees and allege that the total amount paid during this period was $524,295.65.

82. Deny the allegations of paragraph "82" except admit that during the period in question there was a reduction of about $500,000 in the account balance of A T & T.

83. Deny the allegations of paragraph "83" except admit that the tax rates set forth in the first sentence thereof are accurate.



*Answer*

84. Deny the allegations of paragraph "84".

85. With respect to paragraph "85" repeat and reallege each and every response in paragraph "31" of this answer to paragraph "31" of the complaint.

86. Deny knowledge or information sufficient to form a belief as to the allegations of paragraph "86".

87. Deny the allegations of paragraph "87".

88. Deny knowledge or information sufficient to form a belief as to the allegations of paragraph "88".

89. With respect to paragraph "89" repeat and reallege each and every response in paragraphs "3", "4", "5", "6" and "7" of this answer to paragraphs "3", "4", "5", "6" and "7" of the complaint.

90. Admit the allegations of paragraph "90" insofar as they state that Empire is an employer subject to the Unemployment Insurance Law and is required thereunder to pay unemployment insurance taxes and allege that these taxes are paid on certain wages pursuant to New York Labor Law, § 570.

91-92. Deny knowledge or information sufficient to form a belief as to the allegations of paragraphs "91" and "92".

93. With respect to paragraph "93" repeat and reallege each and every response in paragraphs "10", "11", "12", "13", "14", "15", "16", "17", "18", "19" and "21" of this answer to paragraphs "10", "11", "12", "13", "14", "15", "16", "17", "18", "19" and "21" of the complaint.

*Answer*

94. Admit the allegations of paragraph "94" insofar as they assert that there was Empire employees who applied for and were granted unemployment insurance benefits over Empire's objection.

95. Admit the allegations of paragraph "95" except allege that benefits were paid to approximately 100 Empire employees.

96-97. Deny the allegations of paragraphs "96" and "97".

98. With respect to paragraph "98" repeat and reallege each and every response in paragraph "26" of this answer to paragraph "26" of the complaint.

99. Deny the allegations of paragraph "99" except admit that during the period in question an estimated $98,786.58 was paid to Empire employees and charged in accordance with the provisions of New York Labor Law, § 581.

100. Deny the allegations of paragraph "100" except admit that during the period in question there was a reduction from an estimated $108,777.66 to $22,130.48 in the account balance of Empire.

101. Deny the allegations of paragraph "101" except admit that the tax rates set forth in the first sentence thereof are accurate except that the 1971 tax rate for Empire was 1.5%.

102. Deny the allegations of paragraph "102".



*Answer*

103. With respect to paragraph "103", repeat and reallege each and every response in paragraph "31" of the answer to paragraph "31" of the complaint.

104. Deny knowledge or information sufficient to form a belief as to the allegations of paragraph "104".

105. Deny the allegations of paragraph "105".

106. With respect to paragraph "106", repeat and reallege each and every response in paragraphs "2" through "105" of this answer to paragraphs "2" through "105" of the complaint.

107. Deny the allegations of paragraph "107".

108. With respect to paragraph "108" repeat and reallege each and every response in paragraphs "2" through "105" of this answer to paragraphs "2" through "105" of the complaint.

109. Deny the allegations of paragraph "109".

FIRST AFFIRMATIVE DEFENSE

110. The Court lacks jurisdiction over the subject matter of this action.

SECOND AFFIRMATIVE DEFENSE

111. The complaint fails to state a claim on which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

112. Defendants have violated no constitutional right of plaintiffs.

FOURTH AFFIRMATIVE DEFENSE

113. Defendants have violated no statutory right of plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

114. The complaint fails to set forth a justiciable controversy.

SIXTH AFFIRMATIVE DEFENSE

115. Plaintiffs have failed to exhaust their administrative and judicial remedies.

SEVENTH AFFIRMATIVE DEFENSE

116. Plaintiffs have suffered no damage by virtue of any action of defendants.

EIGHTH AFFIRMATIVE DEFENSE

117. New York Labor Law, § 592.1 embodies the principle of governmental neutrality in industrial controversies and is consonant with the Constitution and laws of the United States.



NINTH AFFIRMATIVE DEFENSE

118. The instant action is res judicata as against plaintiffs.

TENTH AFFIRMATIVE DEFENSE

119. The instant action is barred by collateral estoppel.

WHEREFORE, defendants demand judgment dismissing the complaint together with the costs of this action.

Dated: New York, New York
December 10, 1973

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**Pre-Trial Order**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4557 (R.O.)

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Plaintiffs,*

—against—

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., State Commissioner of Taxation & Finance,

*Defendants.*

On November 12, 1975, the parties in this action, by their attorneys, appeared before the Court at a pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure, and the following was agreed:

I. JURISDICTIONAL STATEMENT

It is alleged that this Court has jurisdiction of the action under 28 U.S.C. § 1331, 28 U.S.C. § 1337 and 28 U.S.C. § 1343; and that the matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars ($10,000) in respect to each of the plaintiffs.



II. AMENDMENT OF PLEADINGS

1. The pleadings were agreed to be deemed amended in accordance with the framing of the issues in Part IX of this pre-trial order.

2. The parties agreed that the trial of this action should be based upon this order and upon the pleadings as amended.

III. UNDISPUTED FACTS

The parties stipulated that the following facts are not in dispute in this action (each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues):

1. Plaintiffs New York Telephone Company ("TELCO"), Western Electric Company ("WECO"), and Empire City Subway Company (Limited) ("Empire") are domestic corporations organized and existing under the laws of the State of New York, each with its principal place of business in the Southern District of New York. American Telephone & Telegraph Company is a domestic corporation organized and existing under the laws of the State of New York. Plaintiff American Telephone & Telegraph Company, Long Lines Department ("AT&T")* is a department of

* All references to "AT&T" herein refer to American Telephone & Telegraph Company, Long Lines Department, unless otherwise noted.

American Telephone & Telegraph Company having its principal place of business in the Southern District of New York.

2. For the purposes of this lawsuit, the term "Bell System" shall be understood to encompass the American Telephone and Telegraph Company, the twenty-one principal telephone operating companies owned, in whole or in major part by American Telephone and Telegraph Company and such other companies as WECO and Bell Telephone Laboratories, Inc. ("Bell Labs"). The term as so understood includes all plaintiffs.

3. TELCO is an operating company within the Bell System providing telephone communications services within the State of New York.

4. WECO is a manufacturing and supply unit of the Bell System.

5. AT&T is engaged in interstate and international communications services.

6. Empire, a wholly owned subsidiary of TELCO, constructs and maintains conduits and manholes in the New York City boroughs of Manhattan and the Bronx through which telephone cable is laid.

7. Defendant Louis L. Levine is the Industrial Commissioner of the New York State Department of Labor (the "Industrial Commissioner"). The Industrial Commissioner has an office in the Southern District of New York for the conduct of official business.



8. The Industrial Commissioner is charged under the laws of the State of New York with the administration of Article 18 of the New York Labor Law (the "Unemployment Insurance Law"). Included among his duties is directing disbursements from the Unemployment Insurance Fund for the payment of benefits to eligible claimants, which may include individuals who are on strike.

9. James H. Tully, Jr., is the State Commissioner of Taxation and Finance and, as such, heads the New York State Department of Taxation and Finance. Mr. Tully should be and, with the Court's approval, hereby is substituted as a defendant in this action in place of his predecessors, Messrs. Galman and Procaccino. The State Commissioner of Taxation and Finance has an office in the Southern District of New York for the conduct of official business.

10. The State Commissioner of Taxation and Finance is designated under the Unemployment Insurance Law as custodian of the funds requisitioned by the Industrial Commissioner for use in the payment of unemployment insurance benefits to eligible claimants, which may include individuals who are on strike.

11. There is no source, other than employer contributions mandated by the Unemployment Insurance Law and federal funds of the funds in New York State from which:

(a) Unemployment insurance benefits are paid; or

(b) Refunds of overpayments of employer contributions to the Unemployment Insurance Fund are made.

12. At all times material herein, TELCO, WECO, AT&T, and Empire were and are employers subject to the Unemployment Insurance Law and were and are required thereunder to pay unemployment insurance contributions on wages paid to their employees.

13. At all times material herein, TELCO and Empire were subject to the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 151 *et seq.* ("LMRA") and were obligated to bargain collectively with the Communications Workers of America ("CWA" or "International Union") concerning certain non-supervisory employees of TELCO and Empire in a single statewide bargaining unit, resulting in a single statewide collective bargaining agreement. In March of 1971, more than 38,000 TELCO employees were represented by CWA.

14. In March 1971, the Telephone Traffic Union Downstate represented approximately 20,337 TELCO non-supervisory employees; the Telephone Traffic Union Upstate represented approximately 5,646 TELCO nonsupervisory employees; the Union of Telephone Workers (Commercial Department Downstate) represented approximately 8,629 TELCO non-supervisory employees; the Telephone Employees Organization (Accounting Department Downstate) represented approximately 4,071 TELCO non-supervisory em-



ployees; the Telephone Commercial Union (Upstate) represented approximately 1,804 TELCO non-supervisory employees; and the Upstate Telephone Employees Association (Accounting Department) represented approximately 1,142 TELCO non-supervisory employees. The unions named in this paragraph represented a total of approximately 41,629 TELCO employees.

15. At all times material herein, WECO was subject to the LMRA and was obligated to bargain collectively with CWA concerning WECO installers, job clerks and service center employees, respectively, in separate nationwide collective bargaining units. Collective bargaining between WECO and such employees resulted in separate companywide collective bargaining agreements for each such bargaining unit.

16. At all times material herein, AT&T was subject to the LMRA and was obligated to bargain collectively with CWA concerning all AT&T non-supervisory employees. Bargaining for such AT&T employees is conducted in a nationwide collective bargaining unit resulting in a single nationwide collective bargaining agreement.

17. The collective bargaining agreement entered into in 1968 between CWA and TELCO and Empire was scheduled to expire on July 28, 1971, upon the giving of prior notice. Such notice was given by CWA on or about May 24, 1971, and negotiations for a new contract commenced on July 6, 1971.

18. The collective bargaining agreement between the installers and WECO due to expire on April 30, 1971, was extended on a day-by-day basis subject to termination by giving 24 hours written notice. Such notice was given by CWA on or about July 12, 1971. Collective bargaining negotiations had commenced on April 1, 1971.

19. The collective bargaining agreement between AT&T and CWA was due to expire on July 16, 1971. On or about May 10, 1971, CWA notified AT&T of its desire to terminate that agreement and negotiations began on a new agreement on or about June 4, 1971.

20. CWA has labor contracts with twenty-three companies in the Bell System throughout the United States, including, among others, each of the plaintiffs, Chesapeake & Potomac Telephone Company—Washington ("C&P"), The Mountain States Telephone and Telegraph Company ("Mountain States") and Bell Labs.

21. In the spring of 1971 the various collective bargaining agreements between CWA and the several companies of the Bell System were due to expire on different dates; the earliest was the contract covering WECO installers. The agreements which expired prior to July 14, 1971, had been extended on a day-by-day basis to July 14, 1971. As of July 14, 1971, collective bargaining in connection with new contracts had been in process between CWA and all of the Bell System companies having collective bargaining agreements with CWA.



22. On July 14, 1971, a nationwide strike by CWA, which then represented approximately 500,000 Bell System employees, was commenced against all Bell System companies, including TELCO, WECO, AT&T and Empire.

23. On July 18, 1971, agreements were reached, subject to ratification by the covered employees, between CWA and the various Bell System companies, including TELCO, WECO, AT&T and Empire. CWA's Executive Board voted to terminate the strike pending such ratification and ordered all striking employees back to work effective on or about July 21, 1971.

24. Between approximately 96 and 98 per cent of the striking employees of the various Bell System companies throughout the country, including substantially all of the striking employees of WECO and AT&T, nationwide, returned to work on or about July 21, 1971.

25. On and after July 21, 1971, and until the termination of the strike on February 18, 1972, CWA-represented employees employed by plaintiffs in New York, including between approximately 85 and 90 percent of employees scheduled to work at TELCO, substantially all such employees at WECO (except manufacturing employees), and certain of such employees at AT&T continued to stay away from their jobs at the direction of their local unions. Between July 21, 1971, and August 14, 1971, more than 90% of the CWA-represented TELCO employees continued to stay away from work.

26. On August 14, 1971, the respective agreements between CWA and the various Bell System companies including WECO and AT&T, but with the exception of TELCO and Empire, were ratified by the covered employees. The TELCO and Empire employees rejected the contract negotiated on their behalf. The International Union had recommended ratification of said contract.

27. In a letter dated August 27, 1971, CWA President Joseph A. Beirne advised all members of CWA's Executive Board and all CWA National Directors that he had set August 26, 1971, as the strike date for the New York Plant unit. This was pursuant to the Executive Board's authorization to set a strike date for any bargaining unit which rejected their CWA-negotiated contract on August 14, 1971.

28. Approximately 38,000 employees represented by CWA participated in CWA's strike against TELCO for varying periods of time between July 14, 1971, and February 18, 1972.

29. Approximately 41,000 TELCO employees represented by unions other than CWA did not participate in CWA's strike against TELCO.

30. About 90% of the approximately 5,500 AT&T employees in Manhattan and Westchester, Nassau and Suffolk Counties (represented by CWA Local 1150) and about 95% of the approximately 600 employees at WECO's Service Division's facility located on West Houston Street in Manhattan (represented by CWA



Local 1196), one of three such facilities located in New York State, had returned to work before the eighth week of the CWA strike.

31. On February 16, 1972, CWA-represented employees at TELCO and Empire voted to ratify a contract between CWA and their respective employers. On February 17, 1972, a strike settlement agreement covering both Empire and TELCO was reached providing that all CWA-represented employees would return to work on February 18, 1972.

32. The TELCO phase of the aforementioned CWA strike against Bell System was declared by the National Labor Relations Board ("NLRB"), in two separate cases (Case #2-CB-5172, et al., 208 NLRB No. 32, 85 LRRM 1122, and Case #3-CB-1851-11, et al., 208 NLRB No. 31, 85 LRRM 1104), to be illegal because the union had failed to give 60 days notice of proposed modification or termination of the contract in violation of §8(d) of the LMRA. The NLRB also held therein that, because of the illegality of the strike, fines imposed by CWA locals on their members who returned to work during the strike also had been illegal.

33. Section 592.1 of the Unemployment Insurance Law is entitled "Suspension of Accumulation of Benefit Rights" and provides:

> "Industrial controversy. The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning

with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning with the day after such strike, lockout, or other industrial controversy was terminated."

34. Pursuant to the New York State Unemployment Insurance Law, unemployment benefits are paid to strikers and others unemployed due to an industrial controversy after a seven week suspension period, subject to eligibility requirements applicable to all claimants.

35. Pursuant to a stipulation dated June 24, 1974. the parties have agreed, and it has been so ordered by the Court, that the constitutional issues in this case be first and separately tried. On this trial, to the extent that the statistical data contained in the pleadings become pertinent to the constitutional issues, the parties have agreed to use the following data set forth in said stipulation and elsewhere. Defendants have reserved the right to demonstrate that the damages sought are constitutionally or otherwise barred.

a. During the period of the 1971-1972 strike by CWA against plaintiffs and other Bell System companies, which period commenced on July 14, 1971, and terminated on or about February 18-21, 1972, substantial numbers of strikers applied for unemployment benefits and such benefits were paid (after



the 49 day suspension period provided in § 592.1 of the Unemployment Insurance Law and the additional waiting period prescribed in § 590 thereof) to claimants determined to be eligible therefor by the Industrial Commissioner of the State of New York, over the objections of plaintiffs as to their respective employees.

b. Approximately 38,000 employees represented by CWA participated in CWA's strike against TELCO for varying periods of time between July 14, 1971, and February 18, 1972.

c. Approximately 29,000 TELCO employees, 4,150 WECO employees, 350 AT&T employees and 125 Empire employees received unemployment insurance benefits between the week ending September 12, 1971, and the week ending February 27, 1972. Other striking employees did not apply for benefits or were ineligible for unemployment insurance benefits for various reasons such as temporary employment elsewhere, inability to demonstrate a sufficient recent attachment to the labor market by showing employment in at least 20 of the last 52 weeks, sickness or disability, etc.

d. During the 1971-1972 CWA strike about $43,000,000 in unemployment insurance benefits were paid to TELCO strikers and about $100,000 in such benefits were paid to Empire strikers and charged against these plaintiffs' respective accounts in the Unemployment Insurance Fund.

e. Between the week ending September 12, 1971, and the week ending February 27, 1972, unemployment insurance benefits totalling approximately $5,000,000 were paid to WECO claimants and about $500,000 to AT&T claimants and charged against these plaintiffs' respective accounts in the Unemployment Insurance Fund.

f. TELCO's unemployment insurance normal tax rate increased from 0.9% in 1971, one of the lowest possible rates, to 2.3% in 1972, the highest tax rate possible in 1972, and to 2.8% in 1973. Had the aforementioned benefits to strikers not been paid, TELCO's unemployment insurance normal tax rate would have been about 0.8% (or no higher than 0.9%) in 1972 and about 0.5% in 1973. These increased tax rates have resulted in tax payments in 1972 and 1973, respectively, of approximately $6,150,000 and $9,300,000 in excess of taxes which would have been due and payable if benefits had not been paid to strikers during the 1971-1972 CWA strike.

g. Empire's unemployment insurance normal tax rate increased from 1.5% in 1971 to 2.3% in 1972, the highest tax rate possible in 1972, and to 2.7% in 1973. Had the aforementioned benefits to Empire strikers not been paid, Empire's unemployment insurance normal tax rate would have been about 2.1% in 1972 and 1.1% in 1973. These increased tax rates have resulted in tax payments in 1972 and 1973, respectively, of approximately $3,500 and $24,000 in excess of the taxes which would have been



due and payable if benefits had not been paid to strikers during the 1971-1972 CWA strike.

h. WECO's unemployment insurance normal tax rate increased from 0.7% in 1971, the lowest possible normal tax rate in that year, to 2.1% in 1972 (2.3% being the highest tax rate possible in 1972 for a positive account employer) and to 2.5% in 1973. Had benefits not been paid to WECO claimants between the week ending September 12, 1971, and the week ending February 27, 1972, its tax rate would have been about 0.7% in 1972 and about 0.3% in 1973. These increased tax rates have resulted in tax payments in 1972 and 1973, respectively, of approximately $880,000 and $1,150,000 in excess of the taxes which would have been due and payable if such benefits had not been paid.

i. AT&T's unemployment insurance normal tax rate increased from 0.8% in 1971, one of the lowest possible normal tax rates, to 1.0% in 1972 and to 0.9% in 1973. Had benefits not been paid to AT&T claimants between the week ending September 12, 1971, and the week ending February 27, 1972, AT&T's normal tax rate would have been about 0.9% in 1972 and about 0.7% in 1973. These increased tax rates have resulted in tax payments in 1972 and 1973, respectively, of approximately $60,000 and $127,500 in excess of taxes which would have been due and payable if such benefits had not been paid.

j. In addition to the excess taxes paid in 1972 and 1973, as described above in paragraphs "f" through "i", plaintiffs may continue to be subject to higher

unemployment insurance tax assessments in subsequent years than they would have been if the unemployment insurance benefits described in paragraphs "d" and "e" above, had not been paid to the employees.

36. Payments made pursuant to the Unemployment Insurance Law amounted to a maximum of $75.00 per week net to each benefited employee during the aforementioned CWA strike against plaintiffs.

37. TELCO's petition to the Public Service Commission ("PSC") for a rate increase in Case No. 26370 included TELCO's unemployment insurance tax (both normal and subsidiary taxes) as an increase in operating expenses. TELCO's brief to the PSC stated:

"C. *New York State Unemployment Taxes*

On 1/1/73 the tax rate increased from 2.9% to 3.7%. Since the 4/72-12/72 taxes were booked at the old rate, an adjustment was made to reflect the increase. The increase in other operating taxes is $2,141,000 ($1,593,000 intrastate) and the decrease in earnings available is $839,000 ($610,000 intrastate)."

[TELCO brief to PSC, July 6, 1973, Appendix A, p. 8, Item C.]

38. PSC Examiner Boschowitz' August 29, 1973, Recommended Decision (Appendix G, p. 3, Item I(3)(c) recognized, as an allowable operating expense, the increase in TELCO's unemployment insurance tax rate, stating:



"(c) New York unemployment taxes increased from 2.9% to 3.7% on 1-1-73, taxes booked at old rate, hence adjustment."

The aforementioned increase was similarly recognized by the PSC in its Opinion No. 73-79 (November 16, 1973, Appendix A, p. 1), which granted a rate increase. This recognition is reflected in the following table, relating to "Other Operating Taxes", which taxes include unemployment insurance and several other taxes.

| | Examiner As Adjusted | Commission Adjustments | As Adjusted |
|---|---|---|---|
| Other Operating Taxes | $326,445 | $9,802(8) | $336,247 |

39. From the year 1941 to June 1973, there has been one strike by employees against TELCO which lasted seven weeks and one strike against TELCO which lasted more than seven weeks.

40. Approximately 50,000 CWA-represented employees of Southern Bell Telephone struck for 72 days in 1955.

41. During the strike referred to in "40", above, CWA gave financial assistance to some of its members who participated in said strike.

42. In 1956, approximately 800 employees participated in a strike by CWA against the Ohio Consolidated Telephone Company commencing on or about July 15, 1956, and ending on or about February 27, 1957.

43. Approximately 7,700 CWA-represented employees of the General Telephone Co. of California commenced a strike on or about October 19, 1963.

44. Approximately 5,900 employees were participating in the strike referred to in "43", above, in February, 1964. Said strike ended on or about March 7, 1964.

45. Before and during the strike referred to in "43", above, CWA had a fund, one of the purposes of which was to provide financial assistance to striking CWA members ("strike fund").

46. On or about October 19, 1963, CWA had approximately $10,000,000 in its strike fund.

47. During the strike referred to in "43", above, approximately $7,000,000 in financial assistance was provided to some CWA strikers from the fund referred to in "45", above.

48. Some CWA members participating in the strike referred to in "43", above, received CWA assistance in paying utility, mortgage, and certain other current expenses.

49. Approximately 11,870 employees in the Plant Department of the Illinois Bell Telephone Co. ("Illinois Bell"), which employees were represented by the International Brotherhood of Electrical Workers ("IBEW"), commenced a strike on or about April 18, 1968, which strike ended on or about September 21, 1968.



50. Approximately 1,657 IBEW-represented employees in the Accounting Department of Illinois Bell did not work during the strike referred to in "49", above, from on or about April 18, 1968, until on or about May 5, 1968.

51. During the strike referred to in "49", above, IBEW gave financial assistance to some of its members who participated in said strike.

52. In order to be eligible for financial assistance during the strike referred to in "49", above, members were required to participate in picketing when asked to do so.

53. Approximately 10,020 CWA-represented employees in the Traffic Department of Illinois Bell commenced a strike on or about April 18, 1968, which strike ended on or about May 5, 1968.

54. During the strike referred to in "53", above, CWA gave financial assistance to some of its members who participated in said strike.

55. Approximately 142 employees in the Commercial Department of Illinois Bell, which employees were represented by the Commercial Telephone Workers Union, did not work during the strike referred to in "53", above, from on or about April 18, 1968, until on or about May 5, 1968.

56. Approximately 35 employees of Illinois Bell, which employees were represented by the Telephone Commercial Employees' Union, did not work during

the strike referred to in "53", above, from on or about April 18, 1968, until on or about May 5, 1968.

57. Approximately 20,000 employees in the Plant Department of the New England Bell Telephone Co. struck for approximately 13 weeks during 1968.

58. During the strike referred to in "57", above, some employees participating in said strike received public welfare benefits.

59. Approximately 2,450 CWA-represented employees of the General Telephone Co. of Ohio commenced a strike on or about July 16, 1973, which strike ended on or about October 4, 1973.

60. During the strike referred to in "59", above, CWA gave financial assistance to some of its members who participated in said strike.

61. During the strike referred to in "59", above, some employees participating in said strike received Food Stamps.

62. Approximately 2,000 CWA-represented employees of the General Telephone Co. of Indiana commenced a strike on or about July 23, 1973, which strike ended on or about September 30, 1973.

63. During the strike referred to in "62", above, CWA gave financial assistance to some of its members who participated in said strike.

64. Approximately 1,000 CWA-represented employees of the General Telephone Co. of Kentucky com-



menced a strike on or about July 23, 1973, which strike ended on or about December 28, 1973.

65. During the strike referred to in "64", above, CWA gave financial assistance to some of its members who participated in said strike.

66. Approximately 400 employees of the General Telephone Co. of Southeast (Alabama) commenced a strike on or about August 12, 1974, which strike ended on or about December 29, 1974.

67. During the strike referred to in "66", above, some employees participating in said strike received union financial assistance.

68. During the strike referred to in "66", above, some employees participating in said strike received Food Stamps.

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## Exhibits

[Plaintiffs' Exhibit 3; Transcript of 1971 Recorded Telephone Message; New York City]

This is Ricky Carnivale, president of Local 1101, CWA. Thursday, August 26th. 5 p.m.

I have just returned from the presidents' meeting. We have won the second battle. There is full International recognition of our strike against New York Tel as of today.

Our bargaining committee stayed in session to outline our demands. Additional assistance by research people to back up our bargaining committee's demands has already been established by the International.

President Beirne and the CWA executive board have favored the majority vote of the New York plant presidents and the men and women they represent. The pressure is this strike, and the picket lines are 90 per cent of that pressure.

To the few people who have seen fit to return to work . . . Get out of those damn buildings and support your brothers and sisters who have fought your battles and sacrificed to get more.

The bargaining will resume as soon as the outline is established. The place and time will be established by notification to each bargaining unit.

Remember that food stamps, welfare, unemployment is not, I repeat, not based on the legalities of a strike, but on the need and lost time wages of people.

We are having difficulties in various departments because of the interpretation by different commissioners and erroneous news reports. Our Community Service Committee has brought the entire problem to Sid Lou, who is the



*Plaintiffs' Exhibit 13*

representative of the New York State Labor Council. These problems will be resolved shortly.

All members are eligible for unemployment starting September 1st.

Keep calling this tape till you get through.

Thanks for calling.

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[Plaintiffs' Exhibit 13; Transcript of 1971 Recorded Telephone Message; New York City]

This is Ricky Carnivale, president of Local 1101, CWA, Monday, September 27th. 6:30 p.m.

Bargaining was recessed today at approximately 3:30 this afternoon. The union bargaining committee chairman, Don Sanchez, was sick and asked to be excused. Although his International alternate, Jack O'Brien, was there company chairman, Ray Williams, claimed that they could not negotiate without Sanchez effectively. Negotiations were rescheduled for 10:00 a.m. tomorrow, September 28th.

Contrary to all the rumors and opinions floating around this local, our Community Service Committee reports that food assistance will still be paid to those members not yet receiving unemployment, or other sources of income. The committee recommends that any problems you have in regards to food assistance, come to the local with your unemployment records and have them straightened out.

Also, legal evictions, foreclosures and termination of service notifications such as gas, electric, oil etc. are being paid by the defense fund.

Your diligence on these picket lines has brought our scab list way down. Members who scab will be prosecuted to the

*Plaintiffs' Exhibit 20*

fullest extent of our bylaws and constitution. As president of this local, this I promise you.

The Community Service Committee also reflects a slight backlog of food assistance checks. Tremendous volume alone has caused this and they request that you be patient.

The volume of calls to this local and these tapes are also tremendous. Keep calling until you get through. Again bargaining is rescheduled for tomorrow at 10:00 a.m.

Keep in touch with this tape. Thank you for calling.

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[PLAINTIFFS' EXHIBIT 20; Transcript of 1971 Recorded Telephone Message; Staten Island]

CWA, Local 1102, 467 Seaside Boulevard. This is Artie Schulh speaking. Thursday, July 22nd. 1 p.m.

The continued arrogance of the New York Telephone Company management in their refusal to reenter negotiations with our bargaining committee will prolong our strike action and inconvenience the public. There has been never a major contract negotiated in New York that did not include improvements in fringe benefits.

This type of archaic thinking forces us to continue to remain off the job until a suitable offer is made. To return to work now and then possibly go out again would only tend to prolong our eligibility for benefits, such as unemployment insurance, food stamps, etc.

Be sure to continue your picket assignments. Picketing is everyones responsibility. If you have any doubts of what your assignment is, call the local office on 447-4201.

Thank you for calling.



[PLAINTIFFS' EXHIBIT 24; Transcript of 1971 Recorded Telephone Message; Staten Island]

CWA, Local 1102. This is Jim Curran. Tuesday, December 7th.

Bargaining will resume Wednesday, December 8th. The union is considering the company's request for federal mediation at future negotiations.

According to the Staten Island Advance on Friday, December 3rd, our councilman Frank Deondelulo introduced a resolution which asks the State Legislature to repeal the law enabling strikers to obtain unemployment insurance. This ex-dentist now finds he has all the qualifications for public office is certainly alienating labor and will find this out when he tries for re-election.

Don't forget the Christmas party on Sunday, December 19th, 1:00 p.m., at Labetti Post. All members and their families are invited free. Santa Claus will be there with presents for all the children.

Thank you for calling.

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[PLAINTIFFS' EXHIBIT 26; Transcript of 1971 Recorded Telephone Message; Westchester County]

Sunday, September 12th. This is Leilani Moyers.

Bargaining will resume on Monday. At Saturday's morning and afternoon sessions the union's demands on town reclassifications, union shop and clerical improvements were discussed.

*Plaintiffs' Exhibit 34*

We remind you that members are eligible for emergency food assistance under the CWA defense fund until such time as they receive unemployment checks. Call 472-1103 for an appointment.

Members of Local 1198, Western Electric sales, are also eligible. They should call Local 1198 president, Tim Scarry, on 472-6070.

This is CWA, Local 1103, Scarsdale, New York.

Thank you for calling.

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[PLAINTIFFS' EXHIBIT 34; Transcript of 1971 Recorded Telephone Message; Westchester County]

December 29th. This is Dan Keenan.

We have been on strike 169 days. It could just be possible that it has dragged out this long because the company still doesn't have the sense enough to realize that we're serious about the things we want, need and demand.

There have been management inspired rumors originating in Upstate New York that as of certain dates in January certain striking employees will be replaced. These rumors are totally erroneous. No part of this state has been affected and no part of the state will be affected. This typically underhanded company tactic will fail just as their other gutter style strikebreaking tactics have failed.

But we are putting this membership on notice—this strike must be won on the picket lines. We expect to see every single member of Local 1103 walking those picket lines. And their presence or the lack of it, will be verified by executive board members, chief stewards and picket captains.



*Plaintiffs' Exhibit 36*

Absolutely no benefits, including defense fund assistance, will be granted to any member who does not fulfill his or her picket obligations. I emphasize—there will be no benefits granted to those members who do not walk a picket line assigned.

The picket line is where this strike will be won. Get out there and let New York State management and AT&T know where you stand. This strike is being won. It will be over the day you hit that picket line.

This is CWA, 1103, AFL-CIO, Scarsdale, New York.

Thank you for calling.

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[PLAINTIFFS' EXHIBIT 36; Transcript of 1973 Recorded Telephone Message; Westchester County]

Sunday, April 1st. 1 p.m. This is Bob Brannigan, craft rep installation and repair.

I would like to thank the members who took the time and trouble to vote in the convention delegate election this past week. I would also like to thank the election committee and the volunteers who helped chairman Pat Braggio with this arduous task of counting ballots.

In last night's Gannet chain newspaper, they editorialized again, about aid to strikers and referred to a survey recently taken by New York State Senator Bernard Gordon. The response in his area, the 36th Peekskill area, was that 76 per cent responded against aid to strikers. They also mentioned that there are many union people in the Peekskill area who are against aid to strikers. I would like to see our members write to Senator Gordon and give their views

*Plaintiffs' Exhibit 38*

about aid to strikers. If we didn't get aid during the big strike of '71 and '72, I don't know where we would be right now. They keep harping on the point that it is unfair for an employer to subsidize a strike against themselves. But what about an employer who wants to prolong a strike and gain public animosity against the strikers? If anyone is interested in writing to Senator Gordon, call this office for his address.

Remember our mention of the Smith-Walker Bill in Albany last year which was a bill to deny aid to strikers? Well that is back again, only this time the sponsors are New York State Senator Present, Assemblyman Calogero from the Utica area, and our own Assemblyman Richard Ross from the Mount Vernon area.

This is CWA, Local 1103, AFL-CIO, 791 Central Avenue, Scarsdale, New York.

Thank you for calling.

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[PLAINTIFFS' EXHIBIT 38; Transcript of 1971 Recorded Telephone Message; Nassau County]

CWA, Local 1104. This is Jim O'Connor speaking.

There was a meeting held with president Beirne and the 23 plant presidents on Monday, August 23rd. There were numerous suggestions put forth both by president Beirne and the local presidents. And after six hours of discussion and taking our suggestions, under advisement, president Beirne adjourned the meeting. We will meet again with the presidents on Thursday and give us his decision as to



*Plaintiffs' Exhibit 41*

the course we will follow. In the meantime the strike will continue.

Our members are entitled to unemployment insurance. We have contacted the local employment insurance office and beginning Monday, August 30th, they will accept applications.

Those members whose Social Security numbers end with 0000 to 2499 need apply Monday; from 2500 to 4999, apply Tuesday; from 5000 to 7499, apply Wednesday; from 7500 to 9999, apply Thursday.

Please look up the address for the closest office in the telephone book.

Thanks for calling.

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[PLAINTIFFS' EXHIBIT 41; Transcript of 1971 Recorded Telephone Message; Nassau County]

This is CWA, Local 1104, West Hempstead, New York. Friday, September 17th. This is Pat Meyers.

Bargaining is continuing today between the union and the company. Yesterday's session pertained to discussions about overtime for all Saturdays and some company demands. The union bargaining team is not issuing daily reports. They will only notify us when they have something concrete to report.

There will be a meeting Monday, September 20th at 10:00 a.m. for all the chief stewards and shop stewards at the Plumbers Hall, Willis Avenue, Mineola. It is important that the stewards attend so that they can get the information to pass on to the members.

*Plaintiffs' Exhibit 46*

In as much as you will not be receiving a full unemployment check next week, the union will continue to give out food assistance. You will receive the difference between your unemployment check and your normal food assistance.

An example: If you receive $30 in food assistance and you get a check for $18.75 from the unemployment, you will receive $11.25 from the union. Anyone not eligible for unemployment insurance will continue to receive their normal food assistance.

The local will also be able to give out some mortgage and rent help starting next week. Anyone who is in need of this help, please contact the local office by telephone first.

Thank you for calling.

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[PLAINTIFFS' EXHIBIT 46; Transcript of 1971 Recorded Telephone Message; Queens County]

Wednesday, September 1st. 6:00 p.m.

At a membership meeting held this morning at Antun's Restaurant, president John Renck gave a detailed report on the status of the strike in bargaining.

There has been no counteroffer from the company on any of our demands as of this time.

Over 1,000 members gave a standing vote of confidence to John Renck and his position not to return to work without a contract.

A formal request is being made to the CWA, that the International Union pay for the Blue Cross and Blue Shield premiums during the strike period.



*Plaintiffs' Exhibit 56*

All members are entitled to unemployment benefits as of today and should file at the office nearest your home.

Our strike is as strong, if not stronger, than it's ever been.

This is Ed Creegan for Local 1106, CWA, Queens, New York.

Thank you for calling.

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[PLAINTIFFS' EXHIBIT 56; Transcript of 1971 Recorded Telephone Message; Rockland County]

CWA, Local 1107
Sunday, August 15th. CWA, Local 1107.

On behalf of the officers and executive board of the local and all the local officers of New York State, I want to congratulate the members for rejecting the company offer. The vote was 11,405 reject; 9,734 accept. Your bargaining committee will be going back into bargaining Monday, August 16th. I can assure you that we, the committee, will be extending ourselves to the fullest to come away from the table with a contract acceptable to everyone and we will stay out on strike until this is attained.

Through your actions over the last four weeks and the results of your vote, you have demonstrated to the company despite their propaganda and underhanded methods, that you are not second-rate citizens and will not be treated as such. That you are equal at least to a painter whose hourly rate in three years will be $7.45 compared to $5.90 for you.

Your bargaining committee needs your support now more than we've ever needed it before. Just continue the

*Plaintiffs' Exhibit 65*

good fight. Remember, in another week and a half you will be entitled to unemployment benefits and there are certain benefits you are entitled to now. If anyone has any questions regarding this please call the union office.

And you clerical people . . . If you haven't heard, a grocery clerk for A&P in three years will be making $190.00 per week.

Thank you again. Keep up the fight and keep in touch with your stewards.

There will be a steward's meeting Monday, August 16th at 7:00 p.m.

Charlie Black.

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[PLAINTIFFS' EXHIBIT 65; Transcript of 1971 Recorded Telephone Message; Suffolk County]

CWA, Local 1108, Bay Shore, New York. Saturday, September 25th. 2:00 p.m. Norman Henschel speaking.

Negotiations have been recessed until Monday, September 27th. The company is still insisting that the original July 18th offer be resubmitted to the membership. They must be nuts. They keep b . . . s . . . ing about the effect of the Nixon wage freeze on bargaining instead of all the b.s. all they have to do is to loosen up the purse strings, bargain on the non-money items and let us worry about the Nixon wage freeze and the Cost of Living Council. Just give us something that we can present, not a lot of b.s.

It is the advice of this local and the International that members do not pay telephone company bills for BME and EME. Claims should be processed as usual. Claims not honored due to the strike will be paid by the defense fund.



*Plaintiffs' Exhibit 69*

Next week most members should receive a full check from New York State Unemployment. Food assistance will be only paid to those members who show an unemployment check in a lesser amount than their normal food assistance entitlement. Absolute proof will be required for an assistance.

Next week, each day the Community Service's Committee will meet at the local offices, 1265 Sunrise Highway in Bay Shore. The office space is limited. Please make a telephone appointment before applying for any assistance. Most problems regarding utility and mortgage payments can be resolved by a telephone call rather than office visit. The office number is 665-2680.

Our case against James Kirby, Commissioner of Social Services was presented before Judge Orin G. Judd on Friday, September 24th. As usual with most political appointees in Suffolk County, Mr. Kirby was not prepared. The hearing will continue Tuesday, September 28th with a possible decision by Thursday, September 30th.

Thank you for calling.

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[PLAINTIFFS' EXHIBIT 69; Transcript of 1971 Recorded Telephone Message; Suffolk County]

CWA, Local 1108, Bay Shore, New York. Monday, October 25th. Norman Henschel speaking.

Intensified bargaining sessions continue today in New York City. The company has agreed to make every effort to reach an agreement by November 1st. Any change in the bargaining will be reported on this tape.

*Plaintiffs' Exhibit 69*

The union bargaining committee is working very diligently in order to reach an equitable agreement by the November 1st deadline. Bargaining with the Bell System is a very tough, tedious and thankless job. It is very hard to bargain with a monopoly that doesn't give a damn for its employees.

The company attitude has now changed because of the outside business pressures. Their unemployment rates have skyrocketed and the strike now effects other related industries. For example, it has been reported that the Western Electric Company in New Jersey has temporarily laid off some 500 people due to being overstocked. The business community has turned against the company due to the many troubles and the tremendous backlog of customer orders which now number well over 800,000.

The company must realize the importance of a decent contract. Neither the company nor the employee can afford a strike every three years. The only way to circumvent such a situation is to reach an agreement that is equitable to both parties. A good contract is the only assurance of future labor peace and labor peace is the only solution to improve service which the public rightfully deserves.

Thank you for calling.



[PLAINTIFFS' EXHIBIT 71; Transcript of 1971 Recorded Telephone Message; Geneva]

Friday, September 3, 1971. CWA, Local 1114, Geneva, New York.

Negotiations took place on Tuesday and Wednesday of this week. The company broke off on Thursday and today the meeting resumed.

To all of you stalwarts who saw your duty and are doing it in the face of all the pressures, a ray of light has shown through. All members and nonmembers who have had the fortitude to stand their ground and who can hold their head high are now eligible for unemployment insurance. All in the bargaining unit can now sign up at your earliest possible convenience.

For sure, in case anyone has any doubts, the strike is still on and in full force. It is a full-fledged strike, legal in all respects and with the full backing of the International. Good to see there are still some with guts enough to stand for what is right even in the face of all the ugly rumors and the unethical tactics of the employer. There will be a day of reckoning and we can all go back to work knowing we did a good job.

Thank you for calling. Keep calling for up-to-date news.

[PLAINTIFFS' EXHIBIT 79; Transcript of 1971 Recorded Telephone Message; Kingston]

CWA, Local 1120 news with offices at 580 Broadway, Kingston, New York. Wednesday, August 25, 1971.

The most current information we have at this time is that all 23 local presidents will be meeting with president Beirne tomorrow in New York City. This meeting was called by president Beirne himself last Tuesday when we met with him. Whereas, at that time, he took some of the local president's suggestions under advisement and will report back to us. It is absolutely necessary that the membership of this local stand firm in their present position, maintain picket lines and trust in the elective leadership of this local. I strongly suggest, any and all information, kindly rely on the leadership of this local to give you this information. We all know the press media has occasions to distort the facts. We will do our best to keep you as informed as we possibly can.

On the bargaining scene, negotiations have been recessed at the present pending the meeting with president Beirne tomorrow.

It is true, three locals in this state have chosen to return to work at the direction of their local leadership without the full knowledge of the rest of the state presidents. These three locals are Elmira, Auburn and Binghamton. I am sure we all know who they are. They have been in and out so many times that I am very sure the membership themselves in those locals are confused.

On the local scene, I have been in touch with the people from the New York State Unemployment Service and have



*Plaintiffs' Exhibit 80*

been reassured that as of September 2nd we will be eligible for unemployment benefits. I have instructed all the area representatives to contact in their respective areas, those people in charge of the unemployment offices to establish an orderly way of applying for unemployment benefits. We are looking forward to a smooth operation in regards to our members applying for these benefits.

On the food stamp problem in Ulster County . . . No decision has been rendered as yet from our hearing. We are very hopeful that a decision will be rendered by the end of this week.

For further information continue calling the tape of this local.

I thank you for calling. President Robert Smith speaking.

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[PLAINTIFFS' EXHIBIT 80; Transcript of 1971 Recorded Telephone Message; Poughkeepsie]

August 25th. CWA, Local 1120, Poughkeepsie, New York.

Yes, there is an area in Upstate, New York that has returned to work by order of their local president—Local 1118 of Binghamton, along with Geneva, Newark, Corning and Ithaca areas.

This membership, 1120, must realize that there is a very small membership and one completely surrounded by General Telephone Company, which is of a different union. This membership should also realize that in past incidents that they were in and out so many times that they themselves and their president, when he was at presidents' meeting did not know where they stood at one given moment.

*Plaintiffs' Exhibit 82*

Also, I feel they made a very foolish mistake in returning to work prior to the upcoming 49th day which makes us eligible for New York State unemployment insurance which you have paid into most of your working life. You are on the threshold of receiving New York State unemployment that no New York Telephone employee has ever received before.

Along with the federal food stamp subsidy, which I realize that some areas are having difficulties, I feel that we're over the hump. We're just waiting now for tomorrow's results of meetings with the local presidents' of New York State and Joseph Beirne of the International. Whatever results happen, I will relinquish to this membership as soon as possible.

This is your area rep George Herman.

Keep smiling.

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[Plaintiffs' Exhibit 82; Transcript of 1971 Recorded Telephone Message; Poughkeepsie]

Communication Workers of America, AFL-CIO, Local 1120, Poughkeepsie, New York. September 1st.

The bargaining committee met today and yesterday. Yesterday they talked on substantial wage increase, elimination of "N" days, clerical and chauffeur upgrades. On vacations: If you worked five years you should get three weeks. If you worked ten years you should get four weeks. A better and improved hospitalization plan, which will probably include your dental and paid prescription.



*Plaintiffs' Exhibit 86*

The bargaining committee feels that today they should be able to complete the rest of the demands and their proposals.

A steward's meeting is pending. Stewards will be called by phone as to where and when and time. In regard to members who do not show up for picket duty there are possibilities of being brought up on charges by the trial's committee.

We also suggest that you check with your unemployment office for unemployment insurance and your food stamp program. For those of you that need information in reregard to those, we suggest that you call Ken Hornbeck, the chairman of the committee services.

This is your area rep George Herman.

Thank you for calling.

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[Plaintiffs' Exhibit 86; Transcript of 1971 Recorded Telephone Message; Syracuse]

Tuesday, June 29th.

Attention all members CWA, Local 1123 . . . On Monday, June 28, officers of the CWA locals in Onondaga County met with the county welfare department and discussed aid for strikers. It was a very favorable and informative meeting. Complete details will come later.

Also w. met with the unemployment insurance. One thing for sure . . . 49 day waiting period before collecting the unemployment insurance but it will be there.

*Plaintiffs' Exhibit 93*

More strike information will come in the Local 1123 news bulletin.

Thank you for calling. This is CWA, Local 1123, Syracuse, New York, 700 East Water Street, Midtown Plaza.

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[Plaintiffs' Exhibit 87; Transcript of July 30, 1971, Recorded Telephone Message; Syracuse]

Local 1123, CWA, Syracuse, New York.

We have received definite word that we will receive unemployment benefits after 49 days on strike. President Poole is now negotiating for food stamps and welfare.

Keep calling this tape for further information.

Thanks for calling.

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[Plaintiffs' Exhibit 93; Transcript of 1971 Recorded Telephone Message; Watertown]

Local 1124, Watertown, New York. Wednesday, September 1st. 5:15 p.m.

Negotiations are taking place and the demands are being placed on the bargaining table. Today the rest of the demands are being placed on the table. Discussions took place yesterday on the elimination of the "N" day and the upgrade of clerical and chauffeur. The committee expects the company's offer in the next few days. The money and the big city allowance were discussed today. When we receive additional information we will place it on the tape.



*Plaintiffs' Exhibit 93*

Members are being called to apply for unemployment insurance. All members should have applied by Friday, September 3rd. More are to be called tomorrow. If you have not been called by Thursday, September 2nd, call this office because many of our members are unable to be reached by phone. The last day worked was July 13th. This information is needed for your unemployment form. Also, take your Social Security card.

Members should sign up for food stamps for October by September 10th. After you sign up for your unemployment come up to the office and additional information on the BME and the life insurance will be given to you in the form of a handbill.

The picket schedule for Thursday, September 2nd at 170 Stone Street, from 7:00 to 10:00 is Glen Lehigh and Don Smith; from 10:00 to 1:00 is Bill Carr and John Mullen; and from 1:00 to 4:00 is Rudy Thourdeau and Bob Rose.

The officer on duty will be Warren Leffeur. The office will be manned from 9:00 to 12:00 by Sue Miller and from 1:00 to 4:00 by April O'Shea.

Keep calling the tape for further information.

This is CWA, Local 1124, AFL-CIO, Watertown, New York.

Thank you for calling.

[PLAINTIFFS' EXHIBIT 97; Transcript of 1971 Recorded Telephone Message; Schenectady]

CWA, Local 1125. Tuesday, August 24th.

Yesterday a meeting was held in New York. In attendance were the 23 local presidents and Joe Beirne. We had a five hour meeting to discuss the complex situation of the New York plant in light of Tricky-Dick Nixon's wage freeze. We will be meeting again with President Beirne on Tuesday morning, August 26th.

To file your unemployment insurance the following method will be used for your convenience. You may come to the union office and make out a form before August 30th between the hours of 7 a.m. to 2 p.m., Monday through Friday. We would prefer that you make out the form at the union office to expedite matters.

Your reporting day will be based upon the last four numbers of your Social Security number:

| | |
|---|---|
| 001 through 1099: | Monday, August 30th |
| 2000 through 3099: | Tuesday, August 31st |
| 4000 through 5099: | Wednesday, September 1st |
| 6000 through 7099: | Thursday, September 2nd |
| 8000 through 9099: | Friday, September 3rd |

The time that you are to report is determined by the last number of your Social Security number.

0 will be 8:30 to 9:00 a.m.
1 will be 9:00 to 9:30 a.m.
2 will be 9:30 a.m. to 10:00 a.m.
3 will be 10:00 a.m. to 10:30 a.m.
4 will be 10:30 a.m. to 11:00 a.m.



*Plaintiffs' Exhibit 104*

5 will be 11:00 a.m. to 11:30 a.m.
6 will be 1:00 p.m. to 1:30 p.m.
7 will be 1:30 p.m. to 2:00 p.m.
8 will be 2:00 p.m. to 2:30 p.m.
9 will be 2:30 p.m. to 3:00 p.m.

Claims may be filed beginning August 30th or before at the local office.

Thank you for calling.

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[PLAINTIFFS' EXHIBIT 104; Transcript of 1971 Recorded Telephone Message; Glens Falls]

Monday morning. September 13, 1971. Glens Falls, New York. This is Hart Rhodes, Local 1127 president speaking.

After sessions held Saturday negotiations were recessed and are scheduled to resume this morning. President Beirne has called a conference of New York plant bargaining committee members and local presidents for 2 p.m., Wednesday, September 15 in New York City. I will be attending that conference and will report to you via this tape no later than Thursday, September 16th.

A local executive board meeting will follow the meeting with president Beirne, followed by a general membership meeting to be held no later than the middle of next week. More details on these meetings will be placed on this tape following Wednesday's presidents' conference with president Beirne.

Warren and Washington County members should reapply for food stamps on or before September 17th. Town of

*Plaintiffs' Exhibit 112*

Monroe members may apply at the Town Hall in South Glens Falls on September 16th.

All members are reminded to report at the specified time and date at the New York State Unemployment Insurance office on the day of this week assigned to you. You must do this to get your unemployment insurance check.

If you wish to apply for CWA defense fund assistance please do so any time Thursday, September 16, between 9 a.m., and 9 p.m. at the local union office, 71 Main Street, South Glens Falls.

Thanks for calling.

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[PLAINTIFFS' EXHIBIT 112; Transcript of 1971 Recorded Telephone Message; Potsdam]

This is Communication Workers of America, Local 1128. October 25th. 12:00 p.m.

A number of dirty birds flew into this local Friday night —dirty rotten scab birds. But then we are all aware of this now. Action will be taken to counter this.

The business community, which heretofore has supported the telephone company, is now beginning to crack.

The drain on unemployment compensation fund has been so great, the fund is threatened with total collapse. Under the law when such a condition exists, the entire business community is required to replenish the fund. They will be hit in their pocketbook--where it hurts.

Thank you and good night.



[PLAINTIFFS' EXHIBIT 114; Transcript of 1971 Recorded Telephone Message]

Thursday, July 15, 1971
Time: 10 PM

Joe McNiff, President CWA Local 1150

We are doing quite a bit of work trying to clarify the food stamp program. In Manhattan, they claim they don't want us to file before the 27th. In Bergen County, they claim not to file later than the 26th. In Mercer County in Jersey, they say not to file other than on the 20th. In Long Island, they claim file immediately. We are drawing up all these instructions trying to get our people on board—we have the introductory letters as members of this local ready to mail out to those who need them. In the meantime, I want to compliment the members of this local for their showing up and picketing not only at "32" but at 811, White Plains, Long Island and every other area in Jersey that we are using them.

In White Plains yesterday, we had a man hit by a car of a scab. Today in Mt. Kisco, another man was hit by a car driven by a scab. In Newark it looks like the Police Department which was held guilty for the riots in 1967 by a commission which was chaired by a representative of the New Jersey Bell, seems to forget, and is taking out whatever burn they have on the pickets. I understand three women who were on a picket line were ruffed up today by the police. There was a charge of police brutality pressed against them. Bargaining did continue today. This evening I was called by a member of the bargaining unit who tells me that all presidents of the Long Lines Unit will be

brought together to meet at starting noon on Sunday. What this is all about I'll be able to tell you more about it on Monday. In the meantime, maintain those picket lines; accept your responsibility to walk once in about every eleven days.

Thank you for calling.

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[PLAINTIFFS' EXHIBIT 122; Transcript of 1971 Recorded Telephone Message]

Wednesday, September 29, Local 1190, 260 West Broadway, New York City. This is John Flanagan.

The CWA Bargaining Committee has charged the Company with hiding behind the freeze to avoid responsible collective bargaining. The Telephone Company can make any wage proposal they choose to, subject to approval by the President's Council. If any portion of the agreement is not approved by the Government, it could be given to the members when the controls have terminated. So far the Company has refused to bargain not only on money but on non-monetary items not covered by the freeze. In Michigan and Ohio, the members have voted not to accept temporary management assignments to replace supervisors being sent to New York City. Complaints have been filed in 9 States and the District of Columbia, with the Public Utilities Commission. Each of these States has sent supervisors into New York. The Federal Judge has granted a temporary restraining order against the Suffolk County Commissioner of Welfare, requiring him to process applications from our members. George Meany has assigned a member



of his staff to handle all complaints about food stamps in his County. As a result, the Department of Agriculture investigators have visited trouble spots and cleared up most problems. The Company has admitted to a backlog of over 300,000 Installations and predicts monumental problems when the strike is terminated. The strike is more than 91% solid in New York Plant. Bargaining sessions are scheduled for today.

New recordings will be made as information is received. Thank you for calling.

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[PLAINTIFFS' EXHIBIT 128; Transcript of 1971 Recorded Telephone Message; Albany]

Local 1191—Friday, July 2

As we near the strike date, bargaining is continuing in an effort to avert a strike. If the Company will not come across with a good substantial offer before July 14, they will force us off our job and out into the street. We in Western Electric have been working on a day-to-day basis since May 1, that's two months that we have been on the old contract and that is more than ample time for the Company to know our needs but they have offered us very very little in order to support our families. Will they come up with something in the next few days remaining?

*Plaintiffs' Exhibit 142*

Only in the future will we know if the Bell System will force us out of work. We have prepared ourselves with picket assignments and in fact have come up with a new shorter schedule to benefit everyone. The new assignments will be given out at the July 13 Union Meeting and while you are there, if you have not received your Health Service card, pick it up then—it will benefit you and your dependents. Also, 49 days after July 14 you will be entitled to receive unemployment. Food stamp information and other services available to you during the impending strike will be available through your Local Office. We have had time to prepare so you should be ready if the need arises.

This is Lee Hatfield, your Albany Area Representative, wishing you and your loved ones a safe and happy Fourth of July holiday. Thank you for calling.

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[PLAINTIFFS' EXHIBIT 142; Transcript of 1971 Recorded Telephone Message; Buffalo]

Tri-Local Council, CWA, 706 Beach Road, Buffalo, New York. Friday, October 22nd. 5:00 p.m.

As of this time no word has been received from the bargaining committee lifting the news blackout. If word is received the tape will be changed tomorrow morning.



*Plaintiffs' Exhibit 143*

There is a chief steward's meeting, Monday, October 25th, 2:00 p.m. at the Marigold Manor on Maryvale Drive.

Due to a misunderstanding at the unemployment report location, anyone who was not on vacation, I repeat, not on vacation the week of October 11th and still has a "P" marked on their unemployment calendar for the holiday, Monday, October 11th, it was in error. These members should call the union office and give us your name and social security number so we can straighten out this error with the unemployment department.

And also, remember October 25th will also have to have an "N" marked on the calendar for next week.

Thanks for calling.

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[PLAINTIFFS' EXHIBIT 143]

COMMUNICATIONS WORKERS OF AMERICA
AFL-CIO
85 Worth Street
New York, New York 10013

April 8, 1971

To Presidents of Bell System CWA Locals

Fraternal Greetings:

President Beirne has designated Western Electric Installation and C & P of D. C. as the pattern setters in this years' contract negotiations.

Those of you who attended the Denver Convention and workshops, heard President Beirne describe the serious problems that confront us. The situation has not changed since Denver.

*Plaintiffs' Exhibit 143*

On April 9th, a meeting of all Defense Fund Agents will be held in Washington. I have appointed my Assistant, Gene Mays, as the District #1 Defense Fund Agent. The primary purpose of the meeting will be to program Defense Fund Training sessions for all Bell Locals.

Upon Gene's return, we will be announcing the details of the program. However, at this time we can advise you that the classes will be held in each area of District One. Each Local Union will be asked to designate an officer and the Community Services Chairman to attend. These two officers will then be responsible to train the Local Committee responsible for administration of the Defense Fund.

Thus, it would be helpful if each Local President determines now who will attend the classes and also activate the CSC if it is now in a dormant stage.

Local Unions in District One that are now in bargaining and in the first cluster are Western Electric Installation, New Jersey Traffic, New England Directory Clerical and Western Electric Manufacturing in Buffalo. These Local Unions should begin to establish strike committees responsible for, among other things, assignment of picket duty times and locations for each and every member. The staff will be available to assist any Local requesting assistance. Now is the time to make the preparations.

We'll advise you of any significant developments.

Sincerely and fraternally,

/s/ M. Bahr
Morton Bahr
Vice President

MB/pb
cc: G. Cramer
District One Staff



[Plaintiffs' Exhibit 144]

COMMUNICATIONS WORKERS OF AMERICA
AFL-CIO
District One
85 Worth Street
New York, New York 10013

June 21, 1971

File: 1.33

TO: Local Presidents, Locals 1101, 1102, 1103, 1104, 1106, 1107, 1108, 1150, 1190, 1195, 1196, 1198

FROM: E. J. Mays, Assistant to Vice President

SUBJECT: Defense Fund School

Now that a strike date has been set for all Bell System Units, we are scheduling a Defense Fund School to be held at the District Office, 85 Worth Street, N. Y., N. Y. on July 7, 1971 beginning at 10:00 A.M.

We request that the financial officer and the chairman of the Local's Community Services Committee attend this school.

The Union's Constitution now mandates that each CWA Local must have an established and functioning Community Services Committee. Locals who do not have established and functioning C.S.C. Committees, we urge you to establish such Committee *AT ONCE*, as *NO* "Defense Fund Monies" will be advanced to any Local until it has been certified that the Local has an established and functioning Community Services Committee.

*Plaintiffs' Exhibit 146*

DATE: July 7, 1971

PLACE: District Office, 4th Floor

TIME: 10:00 A.M.

E. J. Mays

EJM: slm

cc: Staff Servicing Downstate
Bell Locals

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[PLAINTIFFS' EXHIBIT 146]

COMMUNICATIONS WORKERS OF AMERICA
1925 K Street, Northwest
Washington, D. C. 20006

To: CWA Local Presidents — July 14, 1971

SUBJECT: 1971 Bell System Strike— First Advance — File: 1.33 x 1.30

Fellow Officers:

Now that we are on strike, I felt that I should advise you that the initial Defense Fund advances have been sent to the Defense Fund Agents in each District and your Local will, in the very near future, receive the first advance.

I know that the main objective at this point is the maintenance of picket lines and the morale of the members. As this first money goes out, I wanted to remind you and



*Plaintiffs' Exhibit 146*

through you, the Community Services Committees, that we all have a real job ahead of us in trying to stretch this money as far as it will possibly go.

Obviously, the need at this point is not near as great or as critical as it will become later, which gives further emphasis to the use of frugality and dollar stretching.

I know that I speak for the members of the CWA Executive Board and the CWA Staff who serve as Defense Fund Agents and Field Representatives, in saying to you that our entire Defense organization stands ready to assist you in whatever way we can. We are all in this struggle together and will emerge not only triumphant but with greater appreciation for such things as brotherhood and solidarity.

Sincerely and fraternally,

/s/ GLENN E. WATTS
Glenn E. Watts
Defense Fund Director

NS—2863

[PLAINTIFFS' EXHIBIT 147]

Communications Workers of America, AFL-CIO
85 Worth Street
New York, New York 10013

September 7, 1971

TO: All New York Tel Locals and Locals 1150, 1151 1152, 1190, 1191, 1195, 1196, 1197 & 1198

FROM: E. J. Mays, Defense Fund Agent

SUBJECT: New Guidelines for Food Assistance New York Telephone Strike — File: 1.33 x1.30

For the weeks of September 6th and September 13th, those who qualify on absolute need will receive $2.00 per family member per day—not to exceed 5 days per week and $30.00 per family unit per week.

*No* food assistance is to be given after September 7, 1971, since the members will have other income—which will average $75.00 per week from the New York State Unemployment Compensation.

E.J.M.

EJM/pb



[PLAINTIFFS' EXHIBIT 148]

MORTON BAHR, VICE PRESIDENT
DISTRICT 1

Communications Workers of America
85 Worth Street
New York, N. Y. 10013
Telephone: 431-5937

September 7, 1971

TO THE MEMBERS OF THE
NEW YORK PLANT UNIT

Fellow Members:

In President Beirne's August 30th letter to you, he indicated that we will, from time to time, report to you on the status of negotiations, the problems that confront us and what is being done to resolve these problems. This is the first such report.

• • • • •

[4] I want to also report to you on some other matters of the utmost importance.

*Social Service Assistance (Welfare)*—Some of our members are experiencing difficulties in receiving welfare assistance simply because they are strikers. The New York State Social Service Department has ruled that strikers are eligible to receive welfare benefits as long as they meet the

other qualifications. However, certain counties are defying the State. In Onondaga County (Syracuse) a Judge has issued a preliminary injunction permitting payments to a [5] striker's family but not to the striker himself. This matter will shortly go to trial. The International Union has intervened in the case and has instructed our attorneys to do whatever is necessary to protect our members.

Suffolk County Social Services Commissioner Kirby has taken the position that neither strikers or their families can receive public assistance. The International Union has instructed our attorneys to take legal action against Commissioner Kirby and any other public official that takes similar action against our members and their families.

*Out-of-town Supervisors.* On August 31, President Beirne instructed the Union's attorney's to take legal action against New York Telephone for the importation of out-of-town supervisors into New York City. The International Union's lawyers obtained a summons in Manhattan Criminal Court charging New York Telephone with violating the Administrative Code of the City of New York. The Company immediately transferred the supervisors to Long Island, Westchester and Upstate and sent New York Tel supervisors from these areas into the City. The International Union will charge this Company action constitutes a circumvention of the Law and is illegal. The Company must appear in Criminal Court on Sept. 13.

*Picketing.* Fewer than one-third of the Telephone Company properties are being picketed. *This is not in the best interest of the membership.* The Local Presidents urged a rejection of the July 18th contract. A majority of voting



members rejected and a legal strike is now under way. *Every Local officer* and *every Local member,* unless specifically excused, has an obligation to walk the picket lines. So long as we cannot shut down the Company's operation the maintenance of picket lines around the clock is necessary for an effective strike. Picket lines will keep some of the weaker members from becoming strikebreakers. Picket lines will keep members of other Unions, such as delivery men and some construction trades, from going to work. Most important, manning of picket lines will demonstrate to the management that you intend to support your rejection of the proposed contract and the fight to obtain a more favorable one. I am, therefore, instructing each Local Union to immediately establish around the clock picket lines and to make performance of picket duty, unless excused for good and proper reason, a condition of receiving Defense Fund assistance.

• • • • •

Sincerely and fraternally,

/s/ Morton Bahr
Morton Bahr
Vice President

MB/pb

[Plaintiffs' Exhibit 149]

Morton Bahr, Vice President
District 1

Communications Workers of America
85 Worth Street
New York, N. Y. 10013
Telephone: 431-5937

September 27, 1971

NEW YORK PLANT STRIKE BULLETIN #3

This report covers the period of negotiations between 9/17 and 9/24/71.

• • • • •

[2] While the Bargaining Committee works hard to get a contract, there has been much activity on other fronts.

• • • • •

On September 20, Federal Judge Orin Judd granted the International Union a temporary restraining order against the Suffolk County Commissioner of Welfare requiring him to process applications from our members. On September 24, Commissioner Kirby appeared in court totally unprepared. Judge Judd gave him until September 28 to submit his position in writing. A decision is expected shortly thereafter.

At the request of Secretary Treasurer Glenn Watts, AFL-CIO President Meany assigned a member of his staff, Ray Andress, to handle all complaints about inability to



get Food Stamps in some counties. As a result, U.S. De-
[3] partment of Agriculture investigators have visited several trouble spots in New York and appeared to have now worked out the problems. Anyone having trouble should notify the Union.

As of September 24, affected Local Unions have been advanced $1,441,000 for member assistance.

Telephone Company management is attempting to convey that they can ride the strike out indefinitely. They have, however, admitted to a backlog of some 300,000 installations and predict monumental service problems when the strike terminates. Management has enjoyed the support of the business community. Industry, in general, is not putting the heat on Telco—with some exceptions that telegraph the true situation.

Arcata Communications, Inc., on September 24, asked the U. S. District Court in New York City for temporary and permanent injunctions against N. Y. Tel for refusing to provide requested service. Arcata told the Court: "It is a well-known fact that the demands for telephone service in New York City have exceeded the expectations of N.Y. Tel and its immediate capacity to render such service. A prolonged strike by N.Y. Tel employees has further reduced its ability to furnish prompt and efficient telephone service."

The pressures are on. Management will do everything possible to break your spirit. It won't work. Morale is high. The strike is more than 91% solid. It will be your

solidarity that will lead to a successful conclusion of the strike.

Sincerely and fraternally,

/s/ MORTON BAHR
Morton Bahr
Vice President

MB/pb

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[PLAINTIFFS' EXHIBIT 150]

Communications Workers of America, AFL-CIO
85 Worth Street
New York, New York 10013

October 14, 1971

NEW YORK STRIKE BULLETIN #5

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[2] Striking members who live in Suffolk County received a big boost when U.S. District Court Judge Orin Judd ruled that a person could not be denied welfare assistance because he is a striker. He ordered the County to immediately process applications retroactively. A copy of Justice Judd's order has been sent to the State Supreme Court in Syracuse where a similar case is being heard.

• • • • •

Telephone management is trying to play it "cool"; to give the impression things are normal. However, their actions betray their put on front. Mr. Ellinghaus' personal



plea to the members to put the heat on their officers is one of the give-aways. In addition, Western Electric has filed a complaint with the New York State Department of Labor asking for a denial of unemployment benefits to those Installers and Sales members respecting picket lines. The State is conducting hearings but is continuing to pay benefits. Also, the Western Electric Company has filed a complaint with the NLRB designed to force the Installers back to work. Are these the actions of a Company that is not hurting?

• • • • •

Negotiations should move at a more rapid pace. It will be difficult to report developments as they occur. Every member should bear in mind that *every* action the management takes is to discourage you and weaken the strike. *On the 92nd day of the strike, 91% of the employees are* holding fast. This is a record that you can all be proud of. President Beirne extends his congratulations and appreciation for this true demonstration of trade Union spirit in the fact of battling an automated giant. Just remember, there are serious pressures building on the giant. More than 400,000 people are waiting for telephones. Construction programs have ground to a halt.

Defense Fund assistance to Local Unions has now reached the $1,750,000 mark. Significantly, this is more than New York Plant members have paid into the Defense Fund since they joined CWA.

*Plaintiffs' Exhibit 151*

The total Union is behind our efforts here in New York. Continue to keep the faith. Support your Committee in every way possible.

Sincerely and fraternally,

/s/ Morton Bahr
Morton Bahr
Vice President

MB/pb

P.S. We have just learned that N.Y. Tel is contesting the right of strikers to collect unemployment benefits. *The State will continue to pay all strikers.* This is further evidence of management's state of panic.

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[Plaintiffs' Exhibit 151]

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO
85 Worth Street
New York, New York 10013

October 22, 1971

NEW YORK PLANT STRIKE BULLETIN #6

We can report that as a result of the action taken by the Local Presidents at the October 13 meeting, when President Beirne's recommendation was unanimously agreed to, the bargaining tempo has been stepped up considerably.

The Bargaining Committee met with President Beirne and me in Washington on October 15. The Committee had



*Plaintiffs' Exhibit 151*

done its homework and was able to tell us just what, in their judgment, it would take to get a contract. The meeting was most fruitful.

Over the October 16th weekend, the Company agreed to our proposal to make every effort to reach a full agreement by November 1—or earlier. On October 18, the two committees agreed to a temporary news blackout concerning all aspects of bargaining.

Our Bargaining Committee has been turned loose. They are free to use their judgment to drive for the best agreement possible within the next week. President Beirne is using all of his influence with top government, Industry and public leaders in Washington and New York in support of the Committee's goals. I have had meetings and discussions with high officials in our State.

The Business Community which heretofore has supported the Telephone Company is now beginning to crack. The drain on the Unemployment Compensation Fund has been so great that the Fund is threatened with total collapse. Under the Law, when such a condition exists, the *entire* Business Community is required to replenish the Fund. They will be hit in their pocket-books where it hurts.

The Company is also coming under fire from the New York State and New York City Tax Commissions. I have advised Governor Rockefeller and Mayor Lindsay that the Company has violated the tax laws by not withholding State and City income tax from the paychecks of out-of-town supervisors.

As a result of my complaint to Governor Rockefeller and agreement reached with the Building Trades by our Albany

*Plaintiffs' Exhibit 151*

Local, some 200 supervisors from Massachusetts were prohibited from working on the South Mall, the Albany complex that will house the State Legislature.

Management's "business is normal" got shot down the other day. Western Electric announced hundreds of layoffs from manufacturing plants. The reason? Oversupply due to lack of demand for equipment and parts from New York Tel. The truth is apparent to all. Substantial pressures are on both sides. The Union wants a settlement. We believe the climate is right for a just and equitable agreement *now*.

You, the member, remain the key. Your solidarity is being recognized by the entire labor movement. With your continued support your Bargaining Committee will be able to recommend a contract to the Local Presidents and they in turn will be able to recommend it to you. Your Committee deeply appreciates your expression of support.

Sincerely and fraternally,

/s/ Morton Bahr
Morton Bahr
Vice President

MB/pb



[Plaintiffs' Exhibit 152]

Communications Workers of America, AFL-CIO
85 Worth Street
New York, New York 10013

November 10, 1971

To All Local Presidents, District One

Fraternal Greetings:

The strike against the New York Telephone Company enters the 18th week today. The stamina and spirit of our members in New York Tel and those respecting picket lines in Western Electric and Long Lines, is simply amazing. More than 89% of the New York Plant employees are still on the bricks.

New York State Unemployment Compensation is a tremendous assist to our members. In addition, the CWA Defense Fund is taking care of the necessary payments for shelter and installment payments for cars and appliances where repossession is threatened.

Our Defense Fund, as you know, is being administered in strick accordance with the Rules adopted by the delegates to our Convention. These Rules do not have the kind of flexibility that will enable us to do something "special" for the Thanksgiving holiday. That something special is a substantial Thanksgiving dinner for the striker and his family.

I am, therefore, appealing through you to every single member for a one shot donation of $5.00. Of course, Local treasury donations would be most welcomed additions.

Checks should be made payable to "E. J. Mays—District One" and sent to this office. The receipts will be prorated among all the Local Unions. Since this is earmarked for Thanksgiving, quick action is required.

*Plaintiffs' Exhibit 153*

Our members have the opportunity of demonstrating the spirit of Thanksgiving to their brothers and sisters in need.

Sincerely and fraternally,

/s/ M. Bahr
Morton Bahr
Vice President

MB/pb
cc: District One Staff

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[Plaintiffs' Exhibit 153]

Communications Workers of America, AFL-CIO
85 Worth Street
New York, New York 10013

November 11, 1971

NEW YORK PLANT STRIKE BULLETIN #9

Negotiations took a new twist away from the bargaining table. Last night (Wednesday), Mayor Del Bello of Yonkers met with our Bargaining Committee at his request. The Mayor expressed his deep concern as to the effect our strike has had in each community in the State as well as to the long term effect it will have on telephone service. He expressed his displeasure in the public image that was developed (by the Company) that everything was operating normally. The Mayor said the public should know that service will be in a deteriorating condition for as long as two years after the strike.



*Plaintiffs' Exhibit 153*

Mayor Del Bello requested the Union and Company to meet in his office on Friday, November 12. The Union has accepted. Mr. Del Bello said he is considering requesting every Mayor in every city and hamlet in the State to become involved in an effort to settle the dispute.

At the Bargaining table, however, there was no movement. The management non-bargaining team continued to non-bargain. When confronted with the *fact* that supervisors on Staten Island are receiving the Big City Allowance and it was not offered to our members, management, not having a logical answer could only mutter "we don't have to discuss management wages with you." Talks are continuing on a daily basis.

President Beirne held a meeting with the Committee and Local Presidents on November 9. Mr. Beirne gave details on the preliminary actions taken by the Pay Board. He said it appeared at this time that the Pay Board's action did not stop New York Tel from increasing the July 18 offer as proposed by the Union. He said he believed the circumstances surrounding these particular negotiations would enable us to get the contract approved.

Mr. Beirne reported that there were substantial pressures on the Company to settle the strike. Unlike the financial pressures on our members and their families, the pressures on the Company could not be seen—but they were there.

To add to the pressures, CWA yesterday joined the City of New York and others in an effort to block the proposed $49 million rate increase for New York Tel. We filed our petition with the Public Service Commission.

*Plaintiffs' Exhibit 153*

CWA lawyers filed a petition in Buffalo Federal Court for a temporary injunction to prohibit New York Telephone from tapping the lines in the Union office. The Court was also requested to enjoin the Company and Burns Detective Agency from following members and officers of the Union.

In addition, CWA filed a complaint today with the Office of Emergency Preparedness charging New York Tel with violating the Price Freeze. Since New York Tel was ordered to have out-of-town supervisors pay State and City income tax, management decided to pay these taxes themselves rather than have the out-of-town scabs pay as we do. This constitutes a substantial wage increase and violates the Freeze. How would you like to have the Company pay your taxes?

We have been receiving letters from members indicating severe financial hardship. We have a Defense Fund. You, like other CWA members, have contributed into it. It is there to assist you in your time of need. While there are specific rules for administering the Fund, it does provide for payment of all necessary bills. The Fund's Rules essentially eliminate the need for a member to be scarred as a scab the rest of his life because he couldn't provide shelter for his family or was having his car and furniture repossessed. Members who are confronted with serious financial problems should discuss them with members of their own Local Union Community Services or Defense Fund Committee.

President Beirne once again declared that the N.Y. Plant membership has earned the admiration of the total Union and the entire Labor Movement in the stamina and vitality



*Plaintiffs' Exhibit 156*

they have shown in the long struggle to win an acceptable settlement.

Sincerely and fraternally,

/s/ Morton Bahr
Morton Bahr
Vice President

MB/pb

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[Plaintiffs' Exhibit 156]

Joseph A. Beirne, *President*

Communications Workers of America
(Affiliated with AFL-CIO)
1925 K Street, N.W.
Washington, D.C. 20006
Telephone: FEderal 7-7711

December 14, 1971

To: Members in New York

Dear Colleagues:

From the very bottom of my heart I wish I could be reporting to you the Bell System Management has seen the righteousness of our demands and that we have reached agreement. However, no such glad tidings can be given at this time.

In recent weeks we have stepped up the tempo of our negotiations and have involved a number of Federal and State Officials in them. At all levels, which include our bargaining committee in New York, our District Headquarters and the International Headquarters, we have had activities connected with bargaining going on day and night. The

*Plaintiffs' Exhibit 156*

New York Company and the Bell System still remain adamant and no change has been brought about in their position.

The increased tempo of our activities is designed to bring about a resolution of the struggle at this Holiday Season.

Our Members in the New York Plant, and those of other units who are respecting picket lines for these many months, have earned the undying respect of everyone in CWA and, I am certain, of the American Labor Movement. Your quiet strength and fortitude is an inspiration to all who have ever struggled to attain a better way of life. Whatever the outcome of the struggle one undeniable fact will aways remain—you did what you knew was right and had the courage to support your convictions in an undeniably impressive manner.

The International Executive Board reviewed your situation on December 14th and without a single dissenting vote authorized our Defense Fund Director to spend over a million dollars to give each of you who are on strike or respecting picket lines a Christmas check with which to buy your loved ones a Christmas gift. Just contact your Local to receive it.

We are working tirelessly and with our best efforts to resolve this dispute and have the highest praise for your steadfastness during the last five months.

With a prayer for you and your family, I remain

Sincerely and fraternally,

/s/ J. A. Beirne
Joseph A. Beirne
President



[Plaintiffs' Exhibit 158]

Morton Bahr, Vice President
District 1

Communications Workers of America
85 Worth Street
New York, N.Y. 10013
Telephone: 431-5937

February 4, 1972

To All Members, New York Plant & Empire City Subway Bargaining Unit

Fraternal Greetings:

This report is being written on the 205th day of the most valiant struggle any group of Union members has ever waged in the history of the trade Union movement. This has been a battle that many said was doomed to failure; that you just couldn't "beat the System"; that throughout the history of labor relations in the Bell System, not a single strike ever resulted in any improved monetary or non-monetary offer. Others were quick to point out that IBEW's 18 week strike against Illinois Plant in 1968 (with CWA Traffic members honoring their lines) at a time the Democratic National Convention was held in Chicago resulted in a settlement that did not include any new money and was essentially the same as the one rejected.

There were three significant victories scored. First, the fact that more than 80% of the rank and file membership stuck together in the face of extreme Company pressure and other hardships is a victory of the highest order in the labor movement.

Second, the System moved on two national demands, Union Security and payment for Saturday work. And, finally, additional money was put into the package. The

amount of additional wage benefits is anything but impressive. However, it broke the System's long standing policy of even giving one cent after its final offer. In addition to the IBEW's ill-fated 1968 strike, as far back as 1919 when IBEW struck the System, rather than give one additional cent, the Company permitted the U. S. Government to take over the business. So, while the amount of money was small, the accomplishment and impact on the future is significant.

New York Telephone and AT&T repeatedly said they will *never* change the July 18 offer—and for more than six months they continued to say *never*. They said *never* in relation to new money and they said *never—never* in relation to matters of principle.

"Never" has been removed from AT&T vocabulary. Although there are a number of significant improvements we did not get all we deserve and are entitled to. But, we [2] broke new ground. We led the way for telephone workers across this nation. We will be looking forward to further improvement in 1974 in those former "principle" areas.

The credit for what has been accomplished goes to you, the member, whose perserverance and dedication was visible for all to see. This membership attitude, coupled with the support of the officers and financial resources of the Union (about $15 million in Defense Fund money) convinced the Bell System to reach an accord.

• • • • • •

[4] President Beirne has asked me to say to you "while the changes are not as significant as may be desired or



proper, I sincerely recommend our members vote 'YES' ". I concur with President Beirne's recommendation.

Whatever your choice may be, however, the staff in District One and the national officers of this Union will fully support your decision.

Sincerely and fraternally,

/s/ Morton Bahr
Morton Bahr
Vice President

MB/pb
Enc.

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[Plaintiffs' Exhibit 159]

Morton Bahr, Vice President
District 1

Communications Workers of America
85 Worth Street
New York, N.Y. 10013
Telephone: 431-5937

March 7, 1972

To All CWA Members, New York Plant

Fraternal Greetings:

Since the termination of the strike and up to the present date, I have been negotiating with the management in accordance with the amnesty terms of the strike settlement.

It was immediately clear that when the Company did not win the right to discipline "for strike misconduct in the Company's judgment" hundreds of our members' jobs were saved. There still remained a list of several hundred who

were charged with a variety of alleged criminal acts. All were subject to loss of their jobs.

Through intensive negotiations, we have been successful in restricting the number of discharges to 13. At least one of these members has been indicted by a Grand Jury.

Everyone of these members will have his discharge arbitrated. They are also being provided the best legal services available to defend them against the criminal charges. Also, the Defense Fund will assist these members to support their families until their cases are finally adjudicated.

I want each member to know that a splinter group in Local 1101 known as "Strike Back" severely hurt our efforts to save jobs. Strike Back posted thousands of stickers around the City alleging that "300 would be discharged;" that this was part of the "Beirne sellout." They made it just a bit more difficult for us to get the number down as low as we did. Hopefully, the number will be even further reduced through arbitration. I believe the result, thus far, has demonstrated the effectiveness of the Amnesty Clause.

Immediately after the ratification vote, the Company Vice President of Personnel and I signed a joint petition to the Pay Board requesting approval of the entire contract. We made a formal presentation to the Pay Board on Washington's Birthday. President Beirne's office is in daily contact with the Pay Board, but there is no way to predict exactly when the decision will be forthcoming.

Now that we are back to work several weeks, it is a good time for some reflection.

The fact that more than 80% of the membership stayed together for 218 days is simply incredible. In my judgment, it is a testimonial to three phenomena:



1. Dedication and spirit of the strikers
2. Unemployment insurance
3. Effectiveness of CWA's Defense Fund

The dedication and spirit shown needs no elaboration. It was evident throughout.

The $75.00 Unemployment Insurance gave us some equity with an automated industry whose income continues during a strike and who enjoys the benefits of a legal monopoly. New York Tel and the U. S. Chamber of Commerce are *today* leading the fight in Albany for the repeal of Unemployment Insurance for strikers. They are using our strike as a weapon against all workers. It is urgent that every member write immediately to his State Assemblyman and Senator urging him to vote against the Smith-Walkley Bill to repeal this benefit.

Each of you could best relate the effectiveness of our Defense Fund. It enabled people to remain on strike without losing their homes, being evicted, having cars and furniture repossessed, etc. We had about $13,000,000 in the Fund when the strike began. In order to continue to support the strikers, the International Union had to borrow an additional $2,000,000. For example we gave Local 1101 alone $4,897,425.00.

The effectiveness of our Fund can be seen when measured against IBEW and the Teamsters. Each of these Unions gives a striking member $25.00 a week and you then worry about paying your bills yourself.

It is interesting to note that CWA's Defense Fund paid out more in benefits to New York Tel strikers than New York Tel members have paid in total dues (per-capita and local dues) to CWA since they joined in 1961.

All this is in the past, however. We have fought hard together and hopefully profited by our experiences. This is the time to look ahead and plan for 1974.

In this regard it is important for every member to be aware of the infiltration of many radical groups into the rank and file of Local 1101. These groups were visible throughout the strike. They include: "Workers Vanguard", "Committee for Rank & File Caucuses", "United Action", "Strike Back" and the "Socialist Labor Party".

Each of these groups advocated violence and destruction of property. They operate where dissension exists and where threats of violence cause people to allow them to move in.

For example, on February 10, a group of 40-50 members of Local 1101 purported to be members of Strike Back, raided the District One office. Their stated aim was to rough me up. Why? Because I had the audacity to believe that after seven months on strike, you earned the right to a vote.

I was out of town at an Executive Board meeting. My Assistant, Gene Mays, prevented the police from evicting these men. He wanted to give them an opportunity to express their views. In addition to a flow of the worst obscene language in the presence of our secretaries these brave men cut all the lamp cords, telephone wires, cut the hose in the sink, pasted stickers on the walls and caused other damage.

Then just as the Ku Klux Klan operated, these heroes came back in the dark of night and painted obscene slogans on the outside walls.

During the succeeding week, we got bomb threats and I was warned we would never count the ballots. The night



the count was announced, a car sped by our office and a can went through our front door. Cars with four men in each blocked both ends of Worth Street in a way to be able to get anyone leaving our building. These cowards ran when the police appeared.

It is a matter of record that members of the Communist Party and Socialist Workers Party infiltrated our strike activities in Manhattan and Brooklyn. These non-members and non-telephone workers had one job—create incidents between strikers and police and divide the Local from the International.

Here are a few quotes from the January 1972 issue of "Strike Back" that reports on the near riot that followed the demonstration at Governor Rockefeller's office.

> "Our official target will be the large central office on E. 56th Street. But the word is quietly passed through the ranks that after E. 56th St., we will attack the scab foremen working in manholes on 2nd Avenue".
>
> "Brooklyn strikers have organized themselves into militant raiding parties. Two or three times a week, Brooklyn brothers have harassed foremen, smashed and turned over trucks. . . . ."
>
> "We charged the tool cart and turned it over. The tires are ice picked. Everything breakable is broken."
>
> "We saw a brand new Telco Maverick and splicing truck parked on 55th St. Before the cops could recover, we charged the two vehicles, smashing the windows and steel bodies of both, the Maverick was turned over three times by different parts of the demonstration.

*Plaintiffs' Exhibit 159*

The ladders off the top of the splicing truck disappeared into the middle of our ranks for later use, as cops swarmed around the battered car and truck to prevent more damage."

Strike Back went on to print more and more of the violence that followed the peaceful demonstration at Rockefeller's office sponsored by the Union.

It is obvious that these outside forces—not a single name is signed to any of the publications—planned to instigate and involve many of our members in these acts of violence.

There are allegations that some of the literature distributed during the strike was printed in the Daily World Building, the official paper of the Communist Party.

The labor movement has been faced with an attempt by such groups to infiltrate their ranks before. Our experience shows that their activities cannof stand the light of public exposure and the will of the rank and file and leadership to stand up to the threats of intimidation and harassment.

With the awareness and determination of every member and officer, we shall beat this threat to undermine our Union and the American Labor movement. These men do not belong in any Union—and as President Beirne said: "It is doubtful that they should belong to the human race."

Finally, we must mature to the point where we recognize that we have the best darn Union around, but that it is made up of human beings and thus subject to the errors of people. Changes can and must be made through the internal democratic processes.

Some members, in expressing their frustrations, say "We'll go Teamsters", as if that Union is a cure all for all



*Plaintiffs' Exhibit 161*

problems. The Teamsters have been rejected time and time again by Bell workers. And, only a few months ago, the 4,000 employees of the Puerto Rican Telephone Company (subsidiary of ITT) voted out the Teamsters in an NLRB election. CWA has been asked to move in.

We have the best Union. We have the machinery to make it even better. Working together, we can succeed.

Sincerely and fraternally,

/s/ Morton Bahr
Morton Bahr
Vice President

MB/pb

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[Plaintiffs' Exhibit 161]

COLLECTIVE BARGAINING MEETING
CONTRACT NEGOTIATIONS
WITH
COMMUNICATIONS WORKERS OF AMERICA
DRAKE HOTEL

[September 9, 1971]

• • • • •

[5] Sanchez: I just got some disturbing news. We understand that the New York Telephone Company is taking action with the Unemployment board to postpone payments to our striking

[6] workers. I just want you to know that Joe Beirne said that if you people dare postpone these payments you'll have the Union at your throats for the next 10 years.

• • • • •



[PLAINTIFFS' EXHIBIT 164; CWA Executive Board Report, 1972 Annual Convention, pages 77-79]

# STRIKE AND DEFENSE FUND

**Since its beginning in 1952, the CWA Defense Fund has assisted thousands of CWA members, who have been forced to take strike action. Such assistance has been based on the principle of need, which has been the guideline since the inception of the Fund. CWA has historically done everything that is possible to avoid strikes and work stoppages but regardless of the skill of the negotiators and the patience of the members strike action has been necessary as a last resort. The past year has been one of the most active in the Fund's history.**

Two strikes of long duration were terminated in the past year. They included members of Local 6474 employed by King Radio Corporation at Olathe, Kansas who has been on strike for five years. A final ruling by the courts and the National Labor Relations Board brought the termination of this long struggle.

**The strike which began in September 1970 against the Hamilton Beach Division of Scovill Manufacturing Co. ended with the ordering of a consent election. With a nationwide strike being imminent last July, literally hundreds of schools were conducted by Agents and Field Representatives of the Defense Fund to train Community Services Committees in each Local on the administration of the Fund and on strike assistance. This training did not go in vain. CWA members took to picket lines on the morning of July 14 throughout the Nation. Interestingly, in preparation for this strike,**

**Millions of dollars in CWA's Defense Fund contributed significantly to effectiveness of long New York Plant strike—and scenes like these in Local 1101 were repeated statewide as interviewing, processing and check-writing played their part in the drama.**

CWA made the largest order for picket signs in the history of the American Labor Movement. There were 80,000 weatherproof signs shipped throughout the Nation. Intensive, round the clock bargaining brought a successful conclusion to this strike within a week, during which the Agents, Field Representatives and hundreds of Local committees carried out duties which they had been trained for. CWA members employed by the New York Telephone Company continued their strike action resulting in one of the longest strikes by a large unit in the history of the Union. Seven months were to





pass before a new contract was ratified by the members of this bargaining unit. The Committees administering the Defense Fund in the New York Locals undertook the gigantic task of handling the needs of approximately 40,000 affected members. All public assistance that could be gotten was made available to those involved in the strike, including unemployment compensation and food stamps. In counties that resisted giving assistance to our members, legal action and pressure from the Nation's Capital eventually caused the reactionary county officials to assist our members on those commodities to which they were entitled as taxpayers.

The entire effort was coordinated from the office of Defense Fund Agent Eugene Mays who was in close contact with Defense Director Glenn Watts and Deputy Director J. W. Webb. Toward the latter part of the strike, literally hundreds of members stood in lines awaiting assistance from the Committees administering the Fund. The Defense Fund was nearing the point of exhaustion when the end of the strike came. Currently, an accounting of the Defense Fund money that was spent is under way. Other strikes of large magnitude during the past year included the Western Union employees who are members of Local 1177 in New York. Strike aproval was given to Local 6572 for members employed by the Western Arkansas Gas Company effective April 24, 1972.

CWA Defense operations were given excellent assistance by the Community Services Department of the AFL-CIO during the past year. Another matter which involved the defense of CWA during the past year was dual unionism trials involving four members in Local 2101. Defense Fund Agents who administered the strikes in the ten Districts were:

| | | |
|---|---|---|
| District | 1 | Eugene Mays |
| | 2 | Jane Palmer |
| | 3 | Allen Willis |
| | 4 | Albert Verhaeghe |
| | 5 | Glen Hanson |
| | 6 | Javus S. Weeks |
| | 7 | Duane Haywood |
| | 8 | Fay Marsh |
| | 9 | J. M. Van Houten |
| | 10 | T. J. Volk |

[Plaintiffs' Exhibit 165]

NEW YORK GENERATOR
Official Publication of Local 1101—Communications Workers of America, AFL-CIO; Bronx-Manhattan Plant Department Workers

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Bronx Field Office: 1451 E. L. Grant Hwy, Bronx, N.Y.
Telephone: 681-9022-3

December 1973—Vol. XI, No. 18

• • • • •

[8] Editorial . . .

One of our strike's effects on "ma bell" has recently come to light.

In an attempt to undermine any future strike effort, New York Telephone has filed a suit in Manhattan Federal Court to prevent strikers from collecting unemployment benefits.

But the real humdinger came when the mighty multi-million dollar empire asked the courts to wipe out a $48.6 million debt to the state unemployment fund which came about as a result of our members collecting unemployment during the strike.

New York Tel. would do well to pay the fund what it owes and commence preparations for our next contract, and incidentally, better wages and benefits, instead of looking for ways to sabotage our strike weapon even before we utilize it. CWA has been around for 35 years and will be around for many more, "mother," and your silly games won't change that.

• • • • •



[Plaintiffs' Exhibit 172]

Transcript of "TODAY" Show
NBC News Broadcast of February 4, 1970

• • • • •

[Anchorman Frank Blair]

A three month nationwide strike against the General Electric Company, one of the country's biggest industries, appeared near an end this morning. The two biggest striking unions announced their members had ratified a new contract. Ten smaller unions involved were expected to follow their lead. The walkout had idled 130,000 workers in 135 communities. Strikers at Schenectady, New York, site of G.E.'s biggest plant voted against ratification but union leaders said voting elsewhere, as they put it, makes it impossible to lose. The voting scenes in Cleveland were typical.

[Reporter Douglas Drake—NBC Cleveland]

International Union of Electric Workers has 2700 members in Cleveland. Last night they jammed into their union hall to hear details of the settlement which provides up to 80 cents an hour raise over 40 months. Their enthusiasm to end the strike wasn't dampened by the rejection of the offer by the biggest IUE local, Schenectady, New York.

[Speaker at Podium]

All I know is that Schenectady voted today 5 to 3 to stay out and you know the reason why.

[Unintelligible voices from floor]

*Plaintiffs' Exhibit 172*

[Speaker at Podium]

Because they're getting $65 a week in unemployment compensation.

[Unintelligible voices from floor]

[Speaker at Podium]

All right I understand. Okay. All right. All right. Okay. That's all right. That's all right. That's all right. Now I'll explain the contract. I'll answer any questions on the contract, and we'll take a vote. I say the hell with Schenectady too. Okay. I mean. I'm able to answer any questions in the contract and I wanted to bring it to a vote when you're ready.

[Unintelligible voices from floor]

[Speaker at Podium]

Vote?

[Unintelligible voices from floor]

[Speaker at Podium]

Vote. Yeah. [Banging gavel.] All in favor. All in favor. All in favor of accepting this settlement signify by saying Aye and raise your hand.

[Many voices from floor yelling Aye]

[Reporter Douglas Drake—NBC Cleveland]

Douglas Drake, NBC News, Cleveland.

[Anchorman Frank Blair]

A General Electric spokesman said the settlements would add a billion dollars to G.E.'s costs over the next four years.

• • • • •



[Plaintiffs' Exhibit 184; Proceedings of CWA's 1952 Annual Convention; pages 219, 220, 225]

**All right, the Report of the Committee will be given by its Chairman, Mr. Brown.**

**DELEGATE W. W. BROWN (Chairman, Defense Fund Committee): Mr. President, Fellow CWA Members:**

**REPORT OF THE DEFENSE FUND COMMITTEE FOR PRESENTATION TO THE SIXTH ANNUAL C. W. A. CONVENTION**

**The Defense Fund Committee was created to fill the gap between the long felt need for a defense fund, and a concrete, practical plan for the collection and administration of such a fund in C. W. A.**

**Every step of the way, from Convention action to the formulation of a workable plan, was undertaken with the knowledge that the fate of our Union hung in the balance.**

**President Beirne, acting under a mandate from the Fifth Annual Convention of Communications Workers of America, appointed the committee and instructed it to carry out the will of the Convention as expressed in the following resolution:**

**"WHEREAS, The opinion of most of the delegates shows a strong desire for a national strike or defense fund; and**

**"WHEREAS, There having been several proposals before the Convention of one type or another on the subject, none of which will conform with the Local treasuries and**

**"WHEREAS, In order to build a fund for defense or strike there will, of necessity, be required extensive study of what can best be afforded by all the Locals.**

**"NOW, THEREFORE, BE IT RESOLVED, That the President appoint a committee, the name of which shall be the Defense Fund Committee, duties of which shall be to formulate a plan for the collection of a defense fund and the administration of same, and that the committee report to the 1952 Convention."**

**Meeting for the first time in Washington, D. C., during the week of October 1, 1951, and again during the week of January 14, 1952, the Committee spent several days in intensive discussion of every aspect of the job which it had to do.**

**The clear need for a defense fund was the basic fact on**

which the discussion proceeded. It was recognized that, regardless of every other consideration, the Union could not hope to survive unhurt in time of stress without an adequate defense fund.

The experience of every union that has ever joined battle with its bargaining adversary in a show of economic strength proves that a war chest, under one name or another, is an absolute must.

The question of a name for the fund had been determined by mandate of the Convention.

At the very beginning, it was unanimously agreed that the purpose of the fund "shall be the defense and relief of the Union, its Locals, their members, officers and agents, when circumstances arising out of labor disputes make such defense and relief necessary."

The business before the Committee was to study and analyze [illegible] from the field, to weave these in with the historical background of Convention debate on the subject, and to come up with a plan which would have the best possible chance of [illegible] operation under strike and bargaining conditions in the communications industry.

We found that suggestions from the field fall into three broad and general categories:

1. That a defense fund be maintained and administered at the International Level of the Union, built by setting aside a portion of the present per capita dues to the Union.

2. That the matter of a defense fund was a purely Local function, and one on which the Convention should take no action.

3. That a defense fund be collected from monies outside the present per capita dues, and that such monies be allocated between the International Union and the various Locals.

It can be easily seen that such wide differences of opinion, expressed in so many different plans, forced the Committee to seek further guidance before making its recommendations.

It was here that we sat down to find out what debate had taken place on this subject in the past. The historical background [illegible] available in the minutes of previous conventions. In search [illegible] record, we found that at CWA's First Annual





The answer was obvious. We have seen enough "toothless wonder" to know better.

Therefore, realizing that the chief use of a defense fund is to strengthen the Union's position at the bargaining table, and, where necessary, to sustain effective strike action, the Committee was compelled to reach the conclusion that the defense fund should properly be under the control of the International Executive Board.

This was a crucial decision which was reached after long deliberation. The Committee had found the desire for a "bargaining level" fund as far back as 1947, when the First Annual Convention officially called for an emergency fund to be used solely for the purpose of financing strike action when taken by the Division. In 1947, the Division was the "bargaining level."

Despite individual preferences expressed since that time for a purely Local fund, one fact was undeniable:

The Defense Fund is a tool. It is one of the bargaining tools, similar to such a bargaining tool as statistics which are gathered by the Research Department, and it cannot do a job unless it is held in the proper hands.

Under the control of the same party which is responsible for collective bargaining, the defense fund is the primary means of implementing the bargaining program; operated in any other manner, it would not truly be a defense fund at all. It would be something else.

When it came to consideration of the actual conditions which shape our bargaining program, it again became clear that the defense fund should be under the control of the Executive Board. We asked ourselves certain questions. How is bargaining actually carried out? What overall method, procedure or strategy is followed? What tools are necessary for the job?

We face cold facts when we dig into this subject. The history of bargaining in the communications industry has been a history of writing not one, but many, separate contracts. And always, the first contract has been a pilot contract—or, more specifically, the guinea pig. As the guinea pig goes, so goes the industry. We know that from years of experience. For the sake of illustration, we cite the 1951 bargaining pattern which the Union followed, because that one is fresh in our minds. One section of the nation was wrapped up; a contract setting a general pattern was established, and bargaining then fanned out to the other parts of the nation and Canada.

This strategy not only takes advantage of the variable ex-

[PLAINTIFFS' EXHIBIT 185; CWA Defense Fund Rules and Local Defense Fund Ground Rules, 1970]

• • • • •

[13] 2. Authorized Membership Assistance Expenditures

In order to protect our members from loss of shelter, utilities, home furnishings, cars, medical and insurance coverage, and the hardships occasioned by insufficient food and fuel, Defense Fund monies shall be available subject to the extreme limitations of the Fund and within the intent of the Fund principles. Before Defense Fund money is disbursed—assistance services of the community shall be exhausted—scrounging committees must be utilized to the fullest extent, members and Locals shall make every reasonable effort to arrange deferments or moratoriums on loans, deeds and notes from merchants, landlords and other creditors.

• • • • •

[36] 3. Counsellors should keep in the forefront of their minds that Defense Fund money cannot be spent unless and until all other means and methods for assistance have been exhausted and a real and actual case of hardship or "necessity" has been developed.

• • • • •



[PLAINTIFFS' EXHIBIT 217]

WALL STREET JOURNAL
July 14, 1971

*Strikers on Welfare*
**Workers on Public Aid During Walkouts Draw Increasing Criticism**

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**Critics Say Such Help Leads To Lengthening Disputes; States Complain of Costs**

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**'Strikers Are Taxpayers, Too'**

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By JAMES P. GANNON
*Staff Reporter of* THE WALL STREET JOURNAL

PITTSBURGH—One man who is really worried about the threat of a steel walkout Aug. 1 is Edward H. Kalberer. "I just hate to think of it," he says. "It makes me pray for a miracle of no strike."

Mr. Kalberer isn't a steelworker, a steel executive or a mill customer. He is the man in charge of public-welfare programs in Allegheny County, which encompasses this steel-making center. And he is worried that his understaffed, tightly budgeted county welfare agency may be overwhelmed by strikers applying for food stamps, public assistance and other benefits if the United Steelworkers of America calls a steel-industry walkout next month.

To prepare for the possible deluge, the agency is considering setting up temporary welfare offices near the

mills or setting up shop in the steelworkers' union halls. It estimates that at least 250 extra staffers would be needed to process aid claims from many of the approximately 59,000 steelworkers in the county. But, because of a budget bind, the agency has little hope of adding so much manpower. It has been sending representatives to USW local union meetings to explain eligibility rules and benefits of public-aid programs, hoping that the union officials may do some screening of members to ease the threatened paperwork jam.

The problems of the Allegheny County welfare agency are only one symptom of a major development that has important implications both for welfare programs and for labor bargaining generally.

### Welfare: An Aid to Union Bargainers

Without attracting much attention until recently, American labor unions have developed an increasingly successful technique of using the nation's growing public-aid programs to reduce the economic pinch on striking members. Only now are big employers fully realizing, with alarm, that as a result they face a stronger foe at the bargaining table. Financially, strapped state governments are finding more of a different type of welfare client at their public-aid offices: the factory hand who is generally stereotyped as antiwelfare but who may be changing his attitudes as welfare eases the woes of the walkout.

A considerable controversy is brewing over this trend. Big employers hit hard by recent strikes, such as General Electric and General Motors, are stepping up public attacks on welfare for strikers. Congress and the courts have been considering its merits. The debate, both sides



agree, is likely to persist a long time. "This may be the new industrial-relations issue of the 1970s," one GE management man believes.

Although the big controversy is new, the actual practice isn't. For years striking workers have resorted to public-aid programs during long walkouts. But both management and labor officials agree that the liberalization of welfare-eligibility rules, the development of new programs such as food stamps, and especially the unions' growing sophistication in taking advantage of such aid have made welfare for strikers much more significant in labor-management struggles.

A few samples illustrate this increasingly important role.

### The GE and GM Strikes

In the 101-day national walkout by a coalition of unions against GE in 1969-1970, strikers collected an estimated $30 million of publicly financed aid, ranging from food stamps to welfare checks to unemployment compensation, according to one AFL-CIO official. In Massachusetts, more than 5,000 of the 20,000 GE strikers went on welfare, collecting more than $2.3 million.

James Compton, assistant to the president of the International Union of Electrical Workers, says there is "no question" that public aid "played a very major role" in the strike against GE. He credits the AFL-CIO's community-services department with a "tremendous effort" to tap all available public benefits. The public benefits, in fact, dwarfed the unions' strike funds; the $30 million in public aid was 10 times larger than the special fund the AFL-CIO collected for the union coalition.

In last year's 10-week walkout at GM by the United Auto Workers Union, strikers collected $12 million to $14 million of federally financed food stamps in October and November, the U.S. Agriculture Department estimates. In Michigan, according to state statistics, 75,000 of the 200,000 GM strikers there were certified eligible for food stamps; 25,600 received welfare under either the program for aid to dependent children or general-assistance plans. The dependent-children payments totaled $4.3 million in the last three months of 1970.

The Westinghouse Strike

In a five-month strike by the United Electrical Workers Union against Westinghouse Electric Corp.'s big plant at Lester, Pa., the welfare caseload in surrounding Delaware County ballooned. When the walkout by 5,700 workers started last August, the county had 367 persons in one category of dependent-children relief for families headed by males; that more than doubled, to 779 persons, by January, when the strike was in its last month. The relief rolls dropped back sharply after the strike ended Jan. 25.

These and similar cases are the subject of the first comprehensive research study of the subject, currently being conducted by Herbert R. Northrup, director of the industrial-research unit at the Wharton School of Finance and Commerce at the University of Pennsylvania. Mr. Northrup, an authority on labor matters, believes that the use of public aid in strikes is "a major problem."

"We feel this is becoming a significant welfare cost and is having an impact on collective bargaining by making



strikes longer and settlements higher," Mr. Northrup says. "From a public-policy point of view, we haven't really thought through the question of whether we can live with a system where strikes don't hurt one party seriously. I don't want anybody to starve, but I know collective bargaining can't work unless a strike hurts both sides."

Major employers are becoming more vocal in opposing aid to strikers, particularly since some of the biggest companies have been hit by long, costly walkouts.

Such aid "tends to encourage and prolong strikes," charges George B. Morris Jr., director of labor relations for GM. In a recent speech in New York, Mr. Morris said: "Permitting the trend toward public assistance to strikers to continue is one of the surest ways I know to destroy collective bargaining. Strikes serve the function in collective bargaining of bringing pressure to bear on management and the union to reach a settlement. In order to do this, strikes must pinch both sides."

Virgil B. Day, a GE vice president, charges that public aid in walkouts means "that the government is subsidizing strikes." He adds, "This doesn't help the anti-inflation game plan, and it can't be offset by (governmental) exhortations to negotiate lower settlements."

The Union Viewpoint

Labor leaders don't deny that welfare benefits make surviving a strike easier. But they contend that as taxpayers, union members on strike are as entitled to public aid as other needy people and that life isn't easy for strikers, just because food stamps or welfare checks are available.

Criticism of aid to strikers is "part and parcel of a general attack on the welfare system and on labor unions generally," contends Leo Perlis, director of the AFL-CIO's department of community services. Mr. Perlis has master-minded labor's efforts to tap public programs. Of late, he has been cranking up his defenses. Late last year, during the GM strike, he sent a letter to affiliated unions giving labor leaders suggested ammunition to "answer these attacks."

Some samples: "Taxpayers' dollars are used to feed hungry people in other countries. . . . Tax dollars feed criminals in prison. . . . Tax dollars provide food, clothing, shelter and medical care for enemy prisoners of war. Are fellow Americans engaged in industrial warfare entitled to less?"

Mr. Perlis argues that the only criterion for aid should be need, whether caused by "an act of God, an act of nature, an act of management or an act of labor." Strikers shouldn't receive public-aid benefits if they don't meet the eligibility requirements, he says, but if they qualify, they shouldn't be discriminated against because they are on strike.

Even with public help, "everybody suffers in strikes," asserts James J. Matles, secretary-treasurer of the United Electrical Workers. "It's ridiculous to say they are on easy street" if strikers are receiving food stamps or welfare checks, he says. The idled worker "just piles up a tremendous debt that he has to pay back when he returns to work," he adds.

Community Service Representatives

Partially to aid strikers, the AFL-CIO has developed a nationwide network of 180 full-time "community service



representatives" in 140 areas. These union men are designated by the AFL-CIO but are on the payrolls of the local United Fund or Community Chest—organizations in which labor has considerable clout because of its large contributions. These 180 specialists perform a coordinating role in any strike by an AFL-CIO union, helping the local involved to inform strikers about public-aid programs. They also perform many other jobs that aren't related to strikes, such as helping recruit union members for United Fund drives.

The AFL-CIO has geared up its strike-assistance mechanism to swing into action in case there is a walkout today by the Communications Workers of America against American Telephone & Telegraph.

Individual unions also have their own strike-assistance setups. To prepare for the possible steel strike, for instance, the Steelworkers Union has been holding a series of conferences around the country for local union officers. These officers are told of public-aid programs, eligibility rules and application procedures.

Congress, Courts Study Issue

The debate over public aid to strikers is being echoed in Congress and the courts as legislators and jurists consider the issue.

States vary considerably in the availability of public-aid benefits in walkouts. Only two states, New York and Rhode Island, permit strikers to collect unemployment compensation, and both have a waiting period of seven weeks before a striker can start collecting.

Most states permit strikers to go on welfare if they meet the normal eligibility criteria. GE says it found in

its long strike that of the 33 states in which it operates, only Texas, Virginia and Wisconsin "showed any disposition to bar strikers from collecting state welfare aid."

Under federal guidelines, food stamps, which permit needy families to greatly expand their grocery-buying power, can't be denied strikers who meet normal income guidelines. For instance, a striker's family of four with no more than $1,500 in savings and less than $30 in current monthly income could obtain free a monthly allotment of $108 of food stamps; if the family had $100 monthly income coming from, say, a working wife, then the $108 in stamps would cost $25.

Congressional opponents of giving food stamps to strikers have made several close but unsuccessful attempts to ban the practice. Such an amendment was defeated in the House last December and only last month an attempt to tack a no-stamps-for-strikers clause onto the Agriculture Department's appropriations bill for the current fiscal year was defeated, 225-172.

### Key Court Case

In a key legal case, the Supreme Court recently declined to review a lower court's ruling permitting strikers to receive welfare benefits. International Telephone & Telegraph Corp. had challenged the right of Massachusetts to pay welfare benefits to ITT strikers. But the battle isn't over. ITT is asking the Supreme Court for a rehearing. Significantly, a number of states are joining ITT in asking the court to reconsider. Iowa has filed a friend-of-the-court brief supporting ITT and has been followed by at least 10 other states—Alabama, Arizona, Arkansas, Florida, Maine, Mississippi, North Carolina, Utah, Virginia and Wyoming, according to Lorna L. Williams, special assistant attorney general of Iowa.



Michigan is among the states that can attest to the high welfare costs of a big, concentrated strike. Gerald Miller, a budget aide to the governor, says the UAW strike against GM cost the state about $25 million in added public-aid expenses, including unemployment compensation, besides costing another $100 million in collection of income, sales and corporate taxes. The $25 million covers benefits not only to strikers but also to those laid off because of the strike's impact on other employers.

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## *Are Workers Antiwelfare? Not When They're on It*

*By a* WALL STREET JOURNAL *Staff Reporter*

Workers' attitudes toward welfare may be changing as unions increasingly tap public aid in strikes, many observers believe.

"Once the worker crosses the threshold into the welfare office," his feelings tend to change, says Herbert R. Northrup, who is conducting a major study of the subject. "Once on welfare, you lose your aversion to it," he says. "This means that many people who previously felt that welfare was demeaning now feel that it is their right."

Others agree that the stereotyped antiwelfare views attributed to workers may be incorrect. Leo Perlis, an AFL-CIO official, says that years ago "one of the toughest jobs was to convince our people that it was not a shameful

*Plaintiffs' Exhibit 217*

thing" to accept welfare when on strike. "Now there is less reluctance. There is no longer the shame," Mr. Perlis observes.

Welfare officials say that striking workers increasingly adopt the attitude that they are entitled to their "share" of public-aid programs because their taxes support the welfare system.



[PLAINTIFFS' EXHIBIT 234A; United Steelworkers of America Advertisement, Syracuse Post Standard, April 6, 1960]

**HERE ARE SOME ANSWERS FOR OUR GOOD PEOPLE WHO ARE WALKING THE PICKET LINES AT CARRIER. RUMORS AND COMPANY PROPAGANDA HAVE CONFUSED OR MISLED SOME OF YOU. WE'D LIKE TO SET THE RECORD STRAIGHT. . . .**

**CAN I LOSE MY JOB WHEN AND IF THE COMPANY HIRES REPLACEMENTS?**

**NO . . .** For several reasons. When we win the strike the company will be forced to allow you to return to work as though you had never been on strike. Also, this will certainly be one of the terms of settlement.

**WHEN CAN I START DRAWING UNEMPLOYMENT INSURANCE?**

In just 18 days you will all be eligible for unemployment insurance.

**SUPPOSE I WENT BACK TO WORK FOR A FEW DAYS. DO I HAVE TO BEGIN MY WAITING PERIOD AGAIN?**

**NO . . .** You will be just required to make up the number of days that you were at work.

*Plaintiffs' Exhibit 234A*

**IS THE INTERNATIONAL UNION BEHIND THIS STRIKE?**

**YES . . .** They have been with us all along. Not one cent of our expenses during the election campaign or the strike have come from our local treasury. The International Union has paid for everything.

**DOES THE COMPANY HAVE AS MANY PEOPLE AT WORK AS THEY CLAIM TO HAVE?**

**NO . . .** The company has employed many methods of trying to dazzle you with figures. We have a more accurate count than they have based on checks of the parking lots, buses and inside information. Several of the people who have returned to work are actually representing the union so that we will have correct and accurate information on exactly what's happening inside the plant.

If the company had that many inside and if they were able to produce, do you think they'd be threatening you with layoffs and firings? Would they be begging you to return in print or by calling your home.

**AND IF YOU THINK CONDITIONS ARE GOOD INSIDE CARRIER . . . JUST ASK SOME OF THE PEOPLE WHO ARE INSIDE. NO GROUP TALKING IS ALLOWED . . . NO BREAKS TOGETHER . . . MORALE IS AT AN ALL-TIME LOW.**

***What Are You Afraid Of Carrier?***

**THERE IS NO MUTUAL TRUST AT CARRIER . . . WHO WOULD TRUST A STRIKEBREAKER?**

**UNITED STEELWORKERS of AMERICA**

SYRACUSE POST STANDARD
APRIL 6, 1960



[PLAINTIFFS' EXHIBIT 236]

U. S. News & World Report
October 3, 1960

LABOR WEEK®

## 116 DAYS ON STRIKE—
## 45 MILLIONS IN PUBLIC AID

How taxpayers' money helps to finance strikes—

Steel strikers drew relief grants, got surplus food free. In one State, they collected unemployment insurance. Total of public aid was more than the union put out in strike benefits.

When Long Island Rail Road trainmen struck, they drew from a fund financed by a special tax on the railroads.

An answer now is available to a question that often is asked in this country. That question: Who pays the bills for workers who go on strike after their own money runs out?

The answer, as it involves two big strikes of recent memory, is just now coming to light.

One of these strikes—that of a half million steelworkers in 1959—lasted 116 days. Savings were inadequate to carry many thousands of these workers through the strike. Yet most now are shown to have survived with a minimum of real hardship.

The other strike—involving 1,300 trainmen of the Long Island Rail Road in July—lasted 26 days. These strikers, it turns out, drew incomes amounting to more than half of the pay they would have received if working.

*Taxpayers pay.* In both strikes, the taxpayer made a sizable contribution to support of the strikers. For the steel strikers, the aid came from the general taxpayer through public-assistance programs. In the case of the railroad, federal "unemployment" benefits went to the strikers at the expense of the railroads of the country, which finance the unemployment benefits for rail workers through a special tax.

The story of how the steelworkers made out during their 116 days of idleness was told on September 19 by I. W. Abel, secretary-treasurer of the Steelworkers Union, in a report to that union's convention in Atlantic City. His report disclosed many details of public aid for strikers —details which usually are not disclosed by unions.

It is Mr. Abel's estimate that about 45 million dollars in relief aid and unemployment benefits was obtained from public agencies in that strike. This aid, in his words, "provided the food, shelter and welfare services that made the strike endurable. The sum exceeded by far the amount that the union poured into the districts and locals. Had the union not secured assistance for its members from these agencies, the union's treasury would have been much more severely depleted."

Reports from regional officials showed more than 22.8 million dollars received from public and private agencies for the steel strikers. But total contributions from non-union sources were said to be "far greater, perhaps even twice the amount this figure indicates." That was because some regions kept no records of the aid they had received.

The union itself also drew heavily from its own funds to help support the strikers. Mr. Abel told a union meeting on April 30 that the international union and its locals had spent 20 million dollars on the strike. The Steelworkers Union does not pay weekly "strike benefits," as many unions do, but members receive assistance from the union when the need is great.



"Outside union sources," Mr. Abel said, "provided the major part of strike relief during the 1959 steel strike." All sources together contributed an estimated 65 million dollars to the strikers.

*Where it came from.* The breakdown supplied by the report shows that public-assistance payments ran to more than 22.7 million dollars, with many areas not listing their figures.

Voluntary agencies, such as community chests and united funds, provided an additional $118,712.

Private agencies and public officials in some areas balked at giving assistance to the steel strikers. As a result, Mr. Abel suggested union officials should put more pressure on the agencies, and engage in greater political activity, to insure greater aid in future strikes.

*"Politics" involved.* Pointing out that only two States—New York and Rhode Island—allow strikers to collect unemployment benefits under State insurance plans, the report has this to say:

"Public-assistance agencies vary widely from State to State, both in the adequacy of legal coverage and the reasonableness with which local welfare officials . . . grant assistance. As in the case of unemployment compensation, adequate public-assistance standards are only secured by political activity. Once secured, they must be continually watched so that public officials continue to administer the laws fairly."

To that end, Mr. Abel recommended maintaining continuous, year-round relationships between the union officials and State welfare officials. He suggested also that pressure be exerted on private welfare agencies which decline to give help to strikers. He advised union leaders to "examine the extent to which the administrators of the voluntary agencies fulfill the purposes for which so many Steelworkers contribute generously."

*Unemployment pay.* Part of the public assistance that went to strikers was a payment of 9 million dollars collected by New York steelworkers from the State unemployment insurance fund. The report says that 35,000 workers shared in this payment, after going through a 49-day waiting period.

The New York experience, Mr. Abel said, offers a political lesson for his members in other States. He reported: "This staggering sum of assistance to our striking members in New York clearly demonstrates the need for political activity to legislate humane and fair unemployment-compensation laws."

In a further breakdown of the figures, the report shows more than 12 million dollars received in direct payments from State and county agencies.

Officials of the Pennsylvania public-welfare department told "U. S. News & World Report" that striking steelworkers in that State had collected about 18 million dollars in public assistance during the 116-day walkout. At the peak period, 16,489 families of steel strikers were on the relief rolls, with aid going to a total of 69,186 persons. Average payment to a family during the strike was about $30 per month.



The union report shows that about 179,000 of the steel strikers reside in Pennsylvania—indicating that fewer than 10 per cent of them went "on relief."

*Food, too.* Strikers obtained help in still another form—from the surplus-food program of the U.S. Department of Agriculture. Mr. Abel reported that 105,114 families of strikers got 7,133,210 pounds of surplus foods valued at 1.4 million dollars.

Still other help was available for strikers. Mr. Abel said the union committee with headquarters in McKeesport, Pa., was able to get extensions of time for payment of various bills. These included 120 extensions on light bills, 117 on gas bills, 26 on grocery accounts, 68 on rent payments, 77 on mortgages, 20 on hospital bills, and 18 on furniture bills. The committee also headed off constables with notices to strikers in 22 cases, "sheriff sales" in 15 others.

Not all States co-operated with the union committees in providing relief. Regional union offices in the following States reported no public assistance: Maryland, Georgia, Alabama and Texas. In others, regional officials failed to file reports.

Steel regional leaders in these States gave the following totals on public assistance: Massachusetts, $13,268; New York, $334,208; Pennsylvania, $7,257,402; Ohio, $1,468,019; Indiana, $2,085,463; Minnesota, $1,067,213; and Utah, $96,698.

*Insurance for strikers.* Public-welfare payments were not involved to any extent in the Long Island rail strike. Here the 1,300 striking members of the Trainmen's Union collected a total of $235,000 in unemployment benefits from the federal unemployment-insurance program for railroad employes.

A federal official said that 4,100 other employes of the Long Island got $750,000 in unemployment pay under the same program, having been laid off because of the strike.

This federal program for rail workers is financed entirely by a special tax against the railroads—which puts the railroads in the position of financing strike benefits for employes who walk off the job. This "strike pay" can run as high as $51 a week.

The Trainmen's Union also paid strike benefits to its members on the Long Island, so that the average trainman on strike collected about $85 a week from the union and Federal Government. The average pay when working is about $154 a week.

New York officials said county welfare departments would not issue relief checks to a Long Island striker on top of this unemployment and strike benefit except in a case of extreme hardship.

But the record of these two strikes indicates that unions often are able to get federal, State or county assistance—plus private welfare aid—to tide members over in a big strike. The taxpayer helps to keep the strike going.

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[PLAINTIFFS' EXHIBIT 238]

USWA Strike and Defense Fund Rules

The following Rules have been adopted by the International Executive Board of the United Steelworkers of America to implement Article XIV, Section 17 of the In-



ternational Constitution which provides for the establishment of a separate Strike and Defense Fund and that: "Expenditures from the Fund shall be determined by the International President and International Secretary-Treasurer, subject to the review of the International Executive Board."

1. Strike Authorization. Article XVI of the International Constitution provides that: "No strike shall be called without the approval of the International President." There must be strict adherence to this requirement. Strike relief will not be given for a Local Union if a strike is called without the approval of the International President.

2. Strike Relief Allotted Only On Basis of Need. The current resources of the Strike and Defense Fund and the resources anticipated in the next few years leave no alternative but to allot strike relief only on the basis of need, and not as a matter of right.

Plans for expenditures from the Fund must take into account the potential needs of the entire membership of some 1,200,000 in the United States and Canada. These needs may be many and varied. The number of members affected in particular strikes could range from a handful in certain cases to about 450,000 in basic steel. Very large groups of our membership could be affected in the event of strikes in the can, aluminum, nonferrous and other industries.

Thus, if strike relief benefits were to be paid as a matter of right, the entire Fund could be exhausted by a long

strike in any of the industries where our membership is large. In such a case, the rest of our members would be left without aid from the Fund if they should be required to strike to obtain fair and equitable contracts.

At appropriate times in the future, the International Executive Board will be able to review this matter based on experience over a period of years and the status of the Fund at the time.

3. All Other Available Resources Must Be Utilized. In order to obtain strike relief allotments from the Fund, a Local Union must demonstrate that all other available resources are being utilized, and that an effective strike assistance program has been organized.

Food, clothing, and other forms of assistance are available to striking employees from a number of different sources in different communities. These sources include agencies of the federal, state and local governments, private welfare and community services organizations, credit unions, Local Union funds and District strike funds. In addition, temporary employment opportunities may be available for many strikers, and all strikers can draw upon any of their own assets to help tide them over.

Pamphlet No. PR-305 entitled, "Beyond the Picket Line," published by the International Union, explains how to organize a strike assistance program. The procedures called for in this pamphlet must be followed by Local Unions to the extent applicable in individual strike situations.



4. Minimum Waiting Period. No strike relief allotments shall be made from the Strike and Defense Fund until after a strike has continued for three (3) weeks. This is the minimum waiting period for all strikes. Allotments, however, will not automatically start in the fourth week since, in many instances where other resources are available, it will not be necessary for a Local Union to seek allotments from the Fund until the strike extends for a longer period. Exceptions to the minimum waiting period will be made to take care of cases of more immediate need which may confront individual strikers such as those in a new Local Union.

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PLANNING CHECK LIST

- ☐ Strike Assistance Committee appointed and chairman selected.
- ☐ Rules of USWA Strike and Defense Fund read at Local Union meeting.
- ☐ Contact major social welfare agencies (Welfare Department, Food Stamp Program, etc.) and obtain relevant information regarding eligibility requirements, agency addresses and specific services provided, etc.
- ☐ Are additional phones necessary?
- ☐ Interview forms prepared and sufficient copies duplicated.
- ☐ Selection of physical facilities for strike assistance headquarters. Where will members be interviewed?
- ☐ Have copies of the form, "Protect Yourself," been ordered in sufficient quantity?

- ☐ In addition to Strike Assistance Committee members, are more strike counsellors needed? If so, have they been recruited and trained?
- ☐ Do all strike counsellors know what hours they are assigned to strike headquarters?
- ☐ Does the financial secretary have necessary ledger forms?
- ☐ Has the central labor body been notified of the strike?
- ☐ Will other unions be solicited for financial help?
- ☐ "Thank you" letters sent to appropriate unions, social agencies, and other cooperating community groups and organizations at the conclusion of the strike.

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[PLAINTIFFS' EXHIBIT 239]

WALTER J. BURKE, SECRETARY-TREASURER
I. W. ABEL, PRESIDENT
JOSEPH P. MOLONY, VICE PRESIDENT

United Steelworkers of America
AFL-CIO-CLC
1500 COMMONWEALTH BUILDING
PITTSBURGH, PA. 15222

PHONE: 471-5254
CABLE ADDRESS: USWA

May 16, 1969

To all District Directors, Staff Representatives, Local Union Presidents and Recording Secretaries.

Dear Sir and Brother:

On April 29, 1969 the International Union Executive Board adopted rules and regulations for the operation of



our Strike and Defense Fund. Enclosed is a copy of these rules for your information and guidance.

These rules deal with a number of problems involved in the equitable operation of a Strike and Defense Fund. Paragraph 2 provides for the allocation of strike relief on the basis of need. The reasons for this are clearly stated therein and the Executive Board adopted this principle in order to assure all of our Local Unions that the resources of this Fund will be available to them when and if the need arises.

Paragraph 3 emphasizes the fact that the Strike and Defense Fund is but one of many resources to be used in time of strike. It lists many of these resources which are also outlined in detail in our Pamphlet No. PR-305 entitled, "Beyond the Picket Line", an updated copy which is enclosed. In this regard I would encourage the continuation of all District and Local Union Strike Funds as an additional and important source of support for strikers.

You will note that Paragraph 6 of the rules provides that the International Union Executive Board develop a formula for determining the maximum weekly allotment allowable for any given strike situation. The Executive Board has decided that, for the present, this maximum allotment will be based on a $10 per member figure. This $10 allotment figure bears no direct relationship to the amount of assistance a needy striker may receive. Within the confines of allotted funds, individual assistance will be related to the degree of need rather than to any arbitrary and fixed figure.

Hopefully, as time goes by, our Fund will increase and the Executive Board will be able to improve the maximum allowable allotment.

*Plaintiffs' Exhibit 239*

I urge that you thoroughly acquaint yourself with these rules and explain to the members of your Local Union the grave need for the careful administration of this Fund. Properly utilized, this Fund can be an important source of support to our members in times of stress.

Sincerely and fraternally yours,

/s/ WALTER J. BURKE

Walter J. Burke
International Secretary-Treasurer

Enclosures



[PLAINTIFFS' EXHIBIT 241; Article from Buffalo Courier Express, December 16, 1969]

## Workers Forego Strike Benefits

SCHENECTADY (UPI)—Members of one of the largest union locals in the General Electric Co. strike voted Monday to transfer their strike benefits to workers in other states while they collect New York unemployment checks, according to union officials.

Joseph Mangino, business agent for the 12,500 members of Local 301, International Union of Electrical Workers, said the "solidarity" vote came at an "overflow" local meeting as the GE strike entered its eighth week.

Because the strikers in New York State are now eligible for state unemployment payments, Mangino said, they voted to send the $12 weekly per man in union strike benefits to strikers in other states who do not receive unemployment checks.

[PLAINTIFFS' EXHIBIT 242; Transcript of Labor News Conference, Mutual Broadcasting System, Tuesday, December 16, 1969; Subject: Family Assistance to GE Strikers; Guest: Leo Perlis, director of the AFL-CIO's Department of Community Services Activities]

[1] MUTUAL ANNOUNCER: The following time is presented as a public service by this station and the Mutual Broadcasting System.

HARDEN: LABOR NEWS CONFERENCE. Welcome to another edition of LABOR NEWS CONFERENCE, a public affairs program brought to you by the AFL-CIO. LABOR NEWS CONFERENCE brings together leading AFL-CIO representatives and ranking members of the press. Today's guest is Leo Perlis, director of the AFL-CIO's Department of Community Services Activities.

Through local Community Services Committees, union members work throughout the year to help their fellow union members and their fellow citizens who don't belong to unions, meet personal, family and community problems. Right now, they are making a special effort to help meet the needs of the 150,000 union members and their families on strike against the General Electric Company. Here to question Mr. Perlis about assistance to the GE strikers and their families, and union-sponsored community services in general, are Sam Sharkey, labor specialist for the Newhouse Newspapers, and Neil Gilbride, labor correspondent for the Associated Press.

And now, Mr. Gilbride, I believe you have the first question?



*Plaintiffs' Exhibit 242*

GILBRIDE: Mr. Perlis, just how is the Community Services Department helping the General Electric Company strikers?

PERLIS: Well, we are involved all over the country in organizing community resources and community facilities to help the GE strikers and their families, on the basis of need, regardless of the cause of that need.

Our full time AFL-CIO Community Services people in communities where there are GE strikers are engaged almost full-time in assisting the local unions in obtaining food, clothing, medical care, legal aid, and other services and facilities necessary to sustain families in time of need.

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GILBRIDE: Mr. Perlis, how about direct cash payments of public relief? Are there any circumstances under which a striker can get such money?

PERLIS: Yes. As a matter of fact, in two states, strikers may obtain unemployment compensation.

In New York and Rhode Island, after a waiting period, strikers are entitled to unemployment compensation. In New York, the waiting period is seven weeks, for example.

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[2] Of course, as you know, Mr. Sharkey, the AFL-CIO is raising money from all of our members for the national strike fund, and this is something that the Secretary-Treasurer of the AFL-CIO would know more about than I.

*Plaintiffs' Exhibit 242*

Our job, in AFL-CIO Community Services, is to mobilize community resources to provide the basic help that our people need. I would think that in the long run, if the strike continues over a long period of time—and we hope it is resolved satisfactorily—more help will probably come —most assuredly come—from community resources than from any other source.

• • • • •

GILBRIDE: Mr. Perlis, when a worker goes on strike, what kind of problems worry him most? Which are the most important?

PERLIS: First of all, Mr. Gilbride, he worries about his economic state—will he be able to make ends meet? His wife also worries about that.

Second, he worries about the time on his hands.

Third, he worries about his family relations. In other words, his marital relations, his family problems, his relationship to his wife, his children, etc.

Fourth, he worries about all the problems that accumulate, in terms of his going back to work, the settlement of the strike, and so forth.

I suppose those really embrace his concerns, in a general way.

But, the economic worry is number one; the time on his hands is number two; and his family problems are number three.

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[PLAINTIFFS' EXHIBIT 246; Excerpt from Plaintiffs' Exhibit 261, Welfare and Strikes: The Use of Public Funds to Support Strikers, A. Thieblot, Jr., and R. Cowin (Industrial Research Unit, The Wharton School, University of Pennsylvania, 1972), page 58]

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The experiences of the General Electric and nonferrous metals strikes confirmed that organized labor had discovered the welfare system and compelled a recognition that most future strike assistance for union members is likely to come not from unions, but from public sources. Leo Perlis informed one of the authors that large national and international unions must depend on public funds in order to utilize the strike as a tool of collective bargaining. He said that the cost of engaging in a nationwide strike is too high to permit large unions to support members through their own funds. He affirmed that public aid is a much more important source of strike support than is the union strike fund.[88] The case studies which follow support this contention.

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[88] Interview with Mr. Leo Perlis, July 15, 1971.

[PLAINTIFFS' EXHIBIT 251]

AN OPEN LETTER TO ALL MEMBERS OF IBEW 1357 AND EMPLOYEES OF HTCO

In view of our recent experience, exercising our rights of labor, a strike was brought against our employer HTCO. The strike is over, but our fight continues. One of the issues still to be resolved is the basic right we have to compensation during a called strike.

All of the big business interests have come together—including the U.S. Chamber of Commerce and the Hawaii Employer's Council—to aid Hawaiian Tel management in denying us our unemployment compensation. If they succeed in this anti-labor plot, it will have serious consequences for workers in all unions, in Hawaii and on the Mainland.

With grave concern, and in the defense of our right to strike, a workers committee has been formed. It includes workers from various industries, and rank and file union members from various Hawaii locales who have joined in this effort to protect our rights to unemployment compensation, and to carry out effective strike actions.

A petition of protest has also been drafted by the WORKERS COMMITTEE TO DEFEND THE RIGHT TO STRIKE, to be presented at the hearing in federal court before Judge Pence on Sept. 24, 1974. Your interest, support and participation is needed. This struggle deserves our 100% backing, for it clearly dramatizes the never-ending struggle of the common laborers—you and I, against greedy unfeeling employers.

WORKERS UNITE—
DEFEND THE RIGHT TO STRIKE!



*Plaintiffs' Exhibit 251*

MAHALO!

Gwen Pascua—IBEW 1357
Ko Hayashi—HOE HANA newspaper
Marilyn Yamamoto—IBEW 1357
Adolph Samuel—UPW 646
Jack Komenaga—Ironworkers 803
John Witeck—Labor-Community Alliance
John Grove—HFCT

for: THE WORKERS COMMITTEE TO DEFEND THE RIGHT TO STRIKE

•THINGS *YOU* CAN DO:

1) Sign the *petition* and help circulate it to get as many names as possible.

2) *Join* our workers committee and kokua.

3) Come to the mass rally/demonstration on Sept. 24, 4 p.m. in front of the Federal Court building.

4) Contact your friends in other unions and organizations to get their *support.*

5) Write your personal views on the issue in a letter to Pence, and send it to our committee to be presented on Sept. 24.

For more information please contact us:

THE WORKERS COMMITTEE TO DEFEND THE RIGHT TO STRIKE
1565-A Moani Street, Honolulu, Hawaii 96819
phone: 841-0077 (Ko) 536-2067 (Gwen)

[PLAINTIFFS' EXHIBIT 252]

## A PETITION IN DEFENSE OF THE RIGHT TO STRIKE

We, the undersigned, believe the right to strike, to withhold one's labor in order to gain better political and economic conditions for one's self and all workers, is a basic political and human right.

We see many attacks on this right to strike—compulsory arbitration, anti-dock strike legislation, and legal challenges to the right of strikers to collect food stamps and unemployment compensation for the period of the strike.

We know workers for decades have struggled to win such rights as unemployment compensation. We oppose any attempts by courts and employers to undermine this hard won right, and try to starve strikers to submission.

We earn this compensation by our labor. When we are forced to strike by an employer, the collecting of this compensation is a right due each worker. We will not let our right to strike and receive unemployment compensation be taken away from us. We pledge ourselves to oppose this and all efforts to rob us of our rights to strike and bargain collectively.

WORKERS UNITE—
DEFEND THE RIGHT TO STRIKE!

• • • • •

for more information please contact:

THE WORKERS COMMITTEE TO DEFEND THE RIGHT TO STRIKE

1565-A Moani Street, Honolulu 96819
or call:

841-0077 (Ko) 536-2067 (Gwen)



[PLAINTIFFS' EXHIBIT 253; Covers and pages 1, 4-9]

# Beyond The Picket Line

PAUL FROMM, C.S.R.
PLF. DEF. EXH. V-V
DATE 10-1-74

HOW TO ORGANIZE A STRIKE ASSISTANCE PROGRAM

# BEFORE YOU START

NO two strikes are ever the same and no strike assistance manual can possibly cover all the local factors that may have a bearing on a strike situation.

However, while the details of individual strikes may differ, the preparation is essentially the same for all strikes. Because this handbook is written in rather general terms, keep the following points clearly in mind:

1. Material assistance given through public welfare agencies begins and ends at state borders. Each state has its own set of laws regulating public assistance. No two states have exactly the same welfare laws, although every state provides, or permits, some system of county, city or township agency whose primary function is to give food, shelter, clothing and medical care to those requiring material assistance.

Some states have more liberal laws and provide more generous allotments than others. Some bar men on strike from public assistance. In fact, before this manual is a year old, some state welfare laws will be changed.

There are also differences in the interpretation of state and local welfare laws by relief administrators. This is especially true of local relief administrators where strike welfare laws are more permissive than specific. In any event, a constant check should be maintained to see that local welfare officials and supervisors observe state provisions.

One of the first steps then is to have a thorough knowledge of your state, county, or city welfare laws and regulations. The material presented in this manual must be adapted to local conditions and to the local situation. This information must be obtained locally.

2. The number and kinds of voluntary health and welfare agencies where AFL-CIO members can obtain help during a strike will vary from community to community.







This will permit an organizational meeting to be held and allow the committee to decide on its program without undue pressures from immediate welfare problems.

If the Community Services Committee assumes responsibility for the strike assistance program, the CSC officers will, of course, continue to function in that capacity. However, if a special committee is organized, officers are either appointed by the local union president or elected in accordance with by-laws of the local. Care should be used in obtaining the best possible person to head this important group. The chairman should be free of all other strike duties.

In strikes involving several local unions or where a large number of men are affected, several subcommittees may be necessary. Traditionally these groups include: (1) a fund raising subcommittee; (2) a job-finding subcommittee, and (3) a subcommittee in charge of a commissary. There may be others, depending on the local situation.

The specific functions of these subcommittees will be discussed in a latter section of this manual.

## SUMMARY OF THE FIRST STEP

There can be no effective strike assistance without a responsible and active committee. A strike assistance program can best be handled by the local union's Community Services Committee.

If the local union does not have a standing Community Services Committee, a special strike assistance committee must be organized. To organize this committee the local union may obtain the help of the local full time AFL-CIO Community Services Representative. If there is no full time local Community Services Representative, the chairman of the local central body Community Services Committee should be contacted. The functions of this committee are:

1. Meet with social service representatives.
2. Train strike counsellors.
3. Open and service a strike assistance center.

# MEETING WITH SOCIAL AGENCIES

THE next step in planning for strike assistance, after the designation of a committee, is a survey of the services and assistance available from public and voluntary agencies. In other words: What community resources are available? What kinds of assistance can be expected from tax-supported welfare services? From voluntary agencies?. How does one go about getting help? Where are the agencies located? Who are the agency executives? What are the eligibility requirements?

These questions must be answered at the very outset of strike relief planning.

Before seeking answers to these and similar questions it might be well to sketch in the function of social agencies.

As stated earlier, there are two basic kinds of agencies—*public* or *tax-supported agencies,* and *voluntary* or *private* agencies supported through *voluntary contributions* and *donations.*

Public agencies are services created by law, regulated by law and financed by tax dollars. Officials in charge of public agencies are either elected or appointed through government channels. More than 90 percent of all assistance to needy persons is provided through local, state or federal government agencies. Meeting basic economic needs such as food, shelter, clothing and medical care is generally accepted to be a responsibility of government.

In most states welfare services are channeled through a township, city or county welfare or relief office. As a rule these agencies or bureaus are located in city hall, the county courthouse, or some other municipal building.

Exact names of these agencies will vary from state to state (Public Welfare Department, Department of Public Assistance, etc.) but every state gives assistance in one or







more of the above categories. In most, if not in all states, public assistance is woefully inadequate and bogged down in needless red tape.

In many states local welfare administrators and supervisory boards have a great deal of authority. In such cases the interpretation of state laws is left to local discretion.

Private or voluntary agencies are created by interested citizens and supported through their voluntary contributions and membership fees. During the past 30 years voluntary agencies have banded together for fund raising purposes into a United Fund or Community Chest. Numerous appeals and campaign costs are thus reduced through this one-shot, federated method of fund raising.

For the most part private social agencies give limited financial or other material assistance. Such assistance is usually given on a short-term or emergency basis. Voluntary agencies can be helpful in giving assistance to single men and non-residents who are not eligible for public assistance.

Another important function of the voluntary agency is as a "lever of pressure" to get public welfare supervisors to ease up eligibility requirements and expedite assistance.

Most communities usually have one or more of the following voluntary agencies providing some forms of limited emergency assistance:

Salvation Army
Family Service Society
Red Cross—Home and Veteran Departments
Various Catholic, Protestant and Jewish
Social Services

The Community Services Committee or strike assistance committee should make a careful canvass and listing of all agencies, both public and voluntary, that can give assistance to strikers.

*Plaintiffs' Exhibit 253*

Following is a typical listing of agencies likely to be found in a medium size city. Many communities will not have such an extensive network of services. Others will have many more.

| *Agency* | *Location* | *Type of Assistance* | *Executive or Contact* |
|---|---|---|---|
| Stark County Welfare Department (Public) | Room 10 Courthouse PL. 6-1500 | General relief for county residents | Harold Coy |
| Center City Dept. of Public Assistance (Public) | City Hall 3rd Floor. CO. 9-1000 | General relief for city residents | Herbert Johnson |
| Stark County Veterans' Bureau (Public) | Room 8 Courthouse PL. 6-1500 | General relief for veterans. Counsel on federal programs | Oscar Rem |
| Stark County Chapter American Red Cross (Voluntary) | 44 Wood Street MU. 8-5000 | Emergency aid for families of servicemen | Miss Mary Rahle |
| Family Service Society (Voluntary) | Dollar Bank Bldg. RI. 4-5451 | Family counselling temporary aid | Dan M. Reich |
| Salvation Army (Voluntary) | 210 Federal Street RI. 4-5618 | Emergency aid temporary housing | Capt. George Allen |
| Catholic Charities (Voluntary) | Diocesan Office Bldg. Wood Street MU. 9-3560 | Temporary assistance for needy | Fr. Joseph Coach |

The above check-sheet is only a simulated listing. It indicates one method of determining the agencies that should be invited to meet with the Community Services Committee.

Later the committee will want to make a more detailed *fact sheet* or *directory of agencies* which summarizes all possible services and facilities that can be used in a strike assistance program. In many communities such directories are available from the local Community Chest, United Fund or Council or Social Agencies.

In addition to inviting representatives from public and





*Plaintiffs' Exhibit 253*

voluntary agencies listed above, members of the local union should also meet with spokesmen from the following agencies and organizations:

State Employment Office
Public Housing Authority
Blue Cross, Blue Shield Plans
Legal Aid Society
Community Welfare Council or Council of Social Agencies

If possible, the *Community Services Committee* of the local *central labor body* should call the pre-strike meeting of social agencies. The meeting should be called, of course, at the suggestion of the local(s) on strike.

There are several good reasons for having the central labor union initiate the conference.

In most cases the central labor body CSC will have had previous relations with the community's social agencies. In all probability the central CSC will have worked with the agencies in past strike situations, in organizing union counselling classes and in fund raising campaigns.

Another reason for having the CLU-CSC arrange for the meeting is that the invitation will have added importance since the CLU represents all AFL-CIO affiliates in the area.

In a community where there is a full-time AFL-CIO community services representative with the local United Fund or Community Chest, he will usually initiate action for a joint meeting between social agencies and the strike assistance committee.

Among the objectives of the agency meeting are the following:

1. To canvass agencies for the purpose of determining assistance and services available.
2. To set up a uniform referral system between the strike assistance committee and the agen-

cies which authorize the strike counsellors to act as referral agents.

(a) Discussion under this point will cover the use of the Community Information and Referral Center, if there is such a clearance and referral service in the community.

(b) Included, too, will be a discussion to familiarize agency personnel with the referral form and the interview procedure to be used by the union.

3. An effort should be made, in cooperation with the voluntary agencies, to have eligibility requirements for public assistance liberalized for strikers. It should be pointed out that a strike is a temporary emergency and therefore requirements dealing with automobiles, TV sets, telephones, life insurance and property should be waived.

4. This joint meeting may also designate specific agency representatives to be contacted by the union on all strike-related cases. The union should name a union liaison to be contacted by agency personnel. It may also be advisable at this first meeting to plan for future periodic sessions with agency heads during the course of the strike.

A specific case history will demonstrate the purpose and the importance of a meeting between social agencies and the strike assistance committee.

A striking local union, following procedures outlined in this manual, requested the CSC of the local central labor body to call a meeting with the community's social agencies. Here are some of the topics discussed at that meeting:

(a) Background information on the strike. This was done by a union spokesman primarily for the benefit of agency representatives. Information included possible dates of the strike, the last pay, number of men on strike, number of families involved, where most of the union members live, etc.





**AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS**

GEORGE MEANY
President

LANE KIRKLAND
Secretary-Treasurer

**AFL-CIO**
**DEPARTMENT OF COMMUNITY SERVICES**
815-16th Street, N.W., Washington, D.C. 20006

LEO PERLIS
Director

Publication #78
October 1970

[Plaintiffs' Exhibit 276; Transcript of 1973 Recorded Telephone Message; New York City]

Local 1101, CWA. Tuesday, October 24th, 1973. (SIC) Gregg Tubby, secretary reporting.

The New York Telephone Company today went to court in New York State attempting to block any one on strike from collecting unemployment benefits. It seems they are still feeling the results of the seven-month strike. Their bill for our unemployment must have been many millions of dollars, and now our political involvement can start paying dividends.

The company again has started asking our members to sign "The Codes We Work By." As in the past, this local's position is that we are not, I repeat, *not* going to sign this nonsense.

This local today won a dispute with Western Electric in the Bronx as to who is going to install 701 equipment in the Bronx. It was won in our favor, meaning many hundreds of hours of work for our members.

Thank you for calling.

Keep in touch with these tapes.

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[Plaintiffs' Exhibit 277; Transcript of 1973 Recorded Telephone Message; Staten Island]

CWA, Local 1102. Thursday, October 25th. This is Jim Curran.

The New York Telephone Company along with three other Bell System companies filed suit in Federal Court this week seeking to overturn the New York State law that grants



unemployment insurance to strikers after seven weeks. The company is attempting to have the unemployment insurance to strikers declared unconstitutional. In all probability, this case will go to the Supreme Court for an alternate ruling, pushed all the way by the benevolent bitch Ma Bell.

The labor unions have supported the benefits for strikers. and have played an active role in Albany in opposing efforts to repeal the law. It amazes this local when some of our members ask—why are we involved in politics, and why do we support certain candidates for public office? If companies with millions of dollars are fighting against your benefits, who do you think is fighting for you—the working man and woman.

The shop steward's training class scheduled for October 31st, is cancelled. Training classes will continue on Wednesday, November 7th, and Wednesday, November 14th.

Thank you for calling.

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[Plaintiffs' Exhibit 283; Transcript of 1971 Recorded Telephone Message; Westchester County]

Friday, December 10th, 5:00 p.m. This is Bob Brannigan, craft representative, installation and repair.

Would you like some good news for a change? There will be a Christmas party for members of Local 1103's children on Saturday, December 18th at the Westchester County Center. Hours are: 9:00 a.m. to Noon; babies to 10 year olds. Free toys, games and candy, plus a real live Santa Claus. Come and have some fun for a change.

The Christmas party is located in the Little Theatre, second floor. We ask that you call the union office and tell the receptionist the number of children you are bringing and their ages so that our party committee can tell Santa how many to expect.

Bargaining continued today and there will be a full report on Monday.

Steward and chief steward meetings have concluded for the time being and were extremely encouraging. Keep picketing. It's the best way to show Mother Bell we refuse to kneel to her archaic anti-labor techniques in bargaining.

Redtop. Watchdog. Blue fish. I repeat: Redtop. Watchdog. Blue fish.

This is Local 1103, 791 Central Avenue, Scarsdale, New York.

Thank you for calling.

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[PLAINTIFFS' EXHIBIT 290; Transcript of 1972 Recorded Telephone Message; Westchester County]

Tuesday, January 4th. 5 p.m. This is Bob Brannigan, craft rep, installation-repair.

New York newspapers be damned. We get better and fairer coverage outside the metropolitan area. For example:

The Charlotte Observer, North Carolina, December 26th, gave our strike 2½ columns and mentioned many things that we were not aware of. Such as, 1 Liberty Plaza, Manhattan, 54 stories, fully furnished, carpeted and painted



for the last two months. The only thing missing is tenants because they can't get phones.

Uptown: The Avon Building, 50 stories almost finished, no phones. And Rockefeller Center, two buildings nearing completion, one is for Standard Oil of New Jersey. So far it has only two or three tenants, no phones. The other building is for McGraw-Hill Publishing Company. The Esso Building was lucky, they snuck in ahead of our strike.

This is the type of coverage we should get from New York's yellow sheets. The Miami Herald gave us one whole column, Friday, December 17th, mentioning a new supermarket on upper Broadway where the manager has to use the booth outside on the sidewalk to call his main office every two hours.

So far the waiting list that the company admits to in New York City totals 223,000. Other business giants affected are Dow Jones, Kidder Peabody, AT&T, even Local 1101 waiting to move to new headquarters.

Bargaining continued this afternoon as the strike ended its 175th day.

Remember, no picketing, no aid.

To digress for a minute, let me ask you all to say a prayer for Northern District executive board member, Haldore Johannesen, who suffered a heart attack on New Year's weekend and is presently in the intensive care unit of Northern Westchester Hospital.

This is Local 1103, 791 Central Avenue, Scarsdale, New York.

Thank you for calling.

[PLAINTIFFS' EXHIBIT 295; Transcript of 1972 Recorded Telephone Message; Queens County]

Friday, March 24th. This is John Renck.

At the present time Lobbyist for a repressive management interest group in the State of New York is attempting to take away unemployment insurance benefits for striking workers. At the forefront of this campaign, as you might have suspected, is New York Telephone.

During the recently concluded strike, telephone workers received jobless benefits that permitted us to provide the barest of necessities for ourselves and our families. The overwhelming majority of these workers never had occasion to apply for jobless benefits in the past and hopefully will not have need for them in the future. But the right of workers and their families to at least exist during an industrial dispute must be protected.

You can assist in this fight by immediately writing your State Senator or Assemblyman at the Capitol, Albany, New York, zip 12224 and vote against the Smith-Walker Bill that seeks to deprive you of these benefits.

Stewards are reminded to continue to collect monies for all those members that are still suspended or dismissed for strike activity. You're back on the job receiving pay but those affected by the company's desire to take a pound of flesh soon will need financial assistance. Returns have been good for most areas but others have not done the job. If your steward hasn't asked you to contribute, ask him why he hasn't. It's probably because he doesn't call the tape as often as he should. Stewards are directed to give this money to their district steward for forwarding to the



*Plaintiffs' Exhibit 314*

local union office. To those who have contributed to date, thank you for your generosity.

This is Local 1106 CWA, AFL-CIO, Queens County, New York.

Thank you for calling.

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[PLAINTIFFS' EXHIBIT 314; CWA Local 1101 Publication Distributed to Members in Preparation for 1971-1972 Strike Against the Bell System]

## COMMUNITY SERVICES
## ADVANCE STRIKE RELEASE
## WHAT TO DO WHEN THE STRIKE IS ON

(1) SEEK TEMPORARY EMPLOYMENT. Below, is a list of New York State Employment Centers where you can apply for temporary, full or part time jobs. Pick out one in your area.

### N. Y. STATE EMPLOYMENT CENTERS

| | | |
|---|---|---|
| MANHATTAN— | | |
| | Industrial—255 W. 54th St. | Co-5-2700 |
| | Clerical —575 Lexington Ave | PL-9-1020 |
| BROOKLYN— | | |
| | Industrial—250 Schermerhorn St. | 855-7500 |
| | Clerical —175 Remsen St. (nr. Boro Hall) | 522-2428 |
| BRONX— | | |
| | Industrial—358 E. 149th St. | 993-1321 |
| | Clerical —575 Lexington Ave | PL-9-1020 |

QUEENS—

| | |
|---|---|
| 42-15 Crescent St. LIC | 784-0855 |
| 42-09 Main St. Flushing | 463-4242 |
| 147-10-90th Ave. Jamaica | 739-1775 |

NASSAU Co.—

| | |
|---|---|
| 344 Fulton Ave. Hempstead, NY | IV-6-3434 |

ROCKLAND Co.—

| | |
|---|---|
| 31 So. Main St. Spring Valley, NY | EL-6-6500 |

WESTCHESTER Co.—

| | |
|---|---|
| 78 Main St. Yonkers, NY | YO-9-5000 |

(2) REGISTER FOR UNEMPLOYMENT INSURANCE. —On the first full day off the job report to the New York State Unemployment Insurance Office in your zip code area. A list of offices is available at Local 1101 Headquarters. Experience has shown that the normal waiting period for unemployment insurance payments during a labor dispute is seven weeks. BUT, if you respected the picket lines out of fear of reprisal for your personal safety, the N.Y. State Unemployment Insurance has been known to process claims after a minimum two week waiting period.

*LOAN RELIEF FOR MEMBERS*—Local 1101's Community Services has made arrangements with the Amalgamated Bank of New York, 11-15 Union Square West, New York's only Labor Bank to grant loans to members of 1101 if needed, during the strike. The Amalgamated Bank has made arrangements to grant a 60 day grace period on loan payments so that the first payment would not be due for two months from the date of the loan.



*EXAMPLE*: Loan Date, May 15, 1968, First payment Date, July 15, 1968. Loans may be applied for in person, by mail or telephone by contacting Mr. Philip J. Layh or Mr. John O'Connor at A15-4334. Applicants should introduce themselves as members of Local 1101, CWA and are applying for a STRIKE LOAN. While involved in a work stoppage, wage earners usually experience a great deal of difficulty when attempting to obtain a personal loan from a bank. The Amalgamated Bank recognizes their unique position in regard to strike needs, and will act for members where other banks may not. Any non-member who has difficulty in getting a STRIKE LOAN from the Amalgamated Bank of New York, should report personally to Nancy Bracco, at Local 1101 Headquarters, 224 W. 49th St. to remove any roadblock. Meetings are under way in an effort to obtain temporary jobs through the good offices of the NY Central Labor Council and the Taxi Union. More information will be released as soon as possible. Affiliated Centers of the Dept. of Social Services of the City of NY (for "Instant" relief) have been contacted.

SURPLUS FOOD PROGRAM people have set up a meeting concerning members needing help. More on this will follow too.

CWA DEFENSE FUND food assistance after the first fifteen (15) calendar days of a strike will be available.

Except for necessary food assistance, Defense Fund money for direct assistance of an individual will be available after 30 calendar days of a strike. Applications will be available at Local Headquarters on or about April 30. Brooklyn and Bronx locations are planned.

Your Steward will be kept informed in up-to-the-minute releases. Keep in touch with your steward. The Local tape number is CI-7-2121, and your Community Services Committee number is 581-6558.

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[PLAINTIFFS' EXHIBIT 317]

RHODE ISLAND PUBLIC EXPENDITURE COUNCIL

THE PAYMENT OF
UNEMPLOYMENT COMPENSATION BENEFITS
IN LABOR DISPUTES—

IMPACT ON INDUSTRIAL
DEVELOPMENT IN RHODE ISLAND

JULY 1972

PROJECT RHODE ISLAND

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[14] The Viewpoint of Organized Labor: A Statement by Edwin C. Brown, Secretary-Treasurer, Rhode Island AFL-CIO

For several years it was the opinion of some businessmen in Rhode Island that if the community rating system for taxing employers paying into the employment security fund was changed to a so-called merit rating system the economic climate of Rhode Island would, like magic, boom and prosper. That business would have an incentive to stabilize employment and save tax dollars for business expansion.



With a "merit rating system" out of state employers would be encouraged to locate in Rhode Island and existing companies would have an incentive to expand. The same arguments were made concerning dual payments under T.D.I. and workmen's compensation.

We later found that these optimistic projections of business was a myth. The Rhode Island business community has not been able to overcome the fact that Rhode Island has some basic inherent weaknesses that every realistic survey and study has revealed.

Leadership in Rhode Island has failed to face the realities of the facts. Rhode Island has some fundamental shortcomings that demand alternative solutions if the sagging economy is to be made prosperous. Rhode Island is off the beaten track of commerce. Our freight rates are high, utility rates are high, cost of government is high, and we have very, very few natural resources we can depend upon.

In addition, we are vulnerable to goods manufactured overseas. Our textile and garment industry is confronted with stiff foreign competition. Synthetic fibers, technological [15] changes, and antiquated plants have also played an important part in the decline of Rhode Island textile industry. Other Rhode Island industries that are vulnerable to imports are the machine tool industry, jewelry, stainless steel flatwear, lace and other industries that depend upon manual labor rather than machinery.

This short background brings us to the subject at hand—paying unemployment benefits to those who are unemployed because of a strike. Here again a very emotional argument can be developed about the unfairness of such a provision.

However, if workers could believe the cries of business that unemployment benefits are a major factor in retarding Rhode Island's economic growth, union members and their officers would join with management and seek immediate remedy. Union representatives concede that the arguments presented by management have a degree of validity, but labor believes that the issue is more or less a paper tiger. Labor believes that if that issue is the real factor in holding the economic growth of Rhode Island back, Rhode Island is in a more difficult situation than most people realize.

If worker representatives would be expected to remove a feature of the Rhode Island law that is obnoxious to some Rhode Island businessmen so that the law would conform with the laws of most other states, it is reasonable to assume that these same businessmen would be willing to accept some of the more liberal features of the laws that exist in these other states.

For example, are these employers willing to forego the one week waiting period? Would they be willing to raise the amount of benefits paid? If the law is changed in one place to tighten up, it is proper it should be made liberal in other [16] areas where the Rhode Island law is out of line with those of other states. It would *not* be a simple matter of merely repealing that section of the law that provides for payment of benefits. Union representatives should not be expected to accept any changes that would leave them vulnerable to the capricious action on the part of an employer who would precipitate a situation that would force workers to withdraw their services. There are many situations when a "strike" may well be "just cause" and unemployment benefits should be paid. Are employers and workers



willing to have the Department of Employment Security or some other government agency determine who is the cause of a work stoppage?

Then there is the matter of the person who, because of fear, or because of his belief, refuses to cross a picket line. A determination must be made as to how these and other situations will be handled.

Employers express the desire that government should play a neutral role in a labor dispute. That unemployment benefits should not be paid after the penalty period has been served. That welfare assistance should not be available when the family runs out of funds. On the other hand, should government deny public services to an employer during the course of a work stoppage?

There is no question that the strike benefit feature has a psychological impact on the collective bargaining process. However, it is only one of the factors that management and labor must take into consideration when considering the total ramifications of a strike.

During the past few years, Rhode Island industry has experienced more than its usual number of work stoppages. Some of these strikes have been of longer duration than [17] usual. The reason we have experienced so many work stoppages is that Rhode Island workers are trying to "catch up" economically with their brothers and sisters in neighboring states.

Since 1968, there has been a national recession that has caused great problems for Rhode Island manufacturing industries. Because Rhode Island is the last to rise economically and the first to feel the impact of a recession, our industry and workers suffer greatly. Rhode Island

workers know that national profits had been high, that generous wage rates and fringe benefits were negotiated elsewhere and they are convinced that they work just as hard, just as long, and the cost of living is as high or higher than their brother elsewhere. They want working conditions comparable to other workers.

In conclusion worker representatives in Rhode Island are ready to work with the business community in improving the Rhode Island economic foundation if they can be convinced that industrial leadership in Rhode Island is sincerely interested in changing the patterns of the past and taking meaningful action to diversify the feeble economic structure that now exists rather than merely nibble away at the social laws placed on the books years and years ago.

## [18] The Viewpoint of Rhode Island Employers: A Summary of Attitudes Derived from a Preliminary Survey of Industrial Managers

This summary of management attitudes and opinions must begin with a clear cautionary statement: due to the time limitations of this phase of Project Rhode Island, only a small sample of Rhode Island business management was interviewed. This points out the essential difference between organized labor and an unorganized business community: the ability of labor to deliver a coherent statement of policy differs markedly from the inability of industrial management to deliver a similar comprehensive statement.

To produce a management position statement to reflect accurately a consensus of management opinion, an earlier study was reviewed and similar methods used. A set of questions derived from a Weekapaug Group survey was used as the basis for a set of interviews with managers



of a small sample[11] of major businesses. A more representative sample for a larger survey is now being planned; the results of this extended study, when available, will be used to modify this statement.

In discussing these issues with industrial managers, it was found that a consensus surrounded the following positions:

1. *Availability of Unemployment Insurance benefits during a labor dispute weakens management's position in labor relations.*

A consensus on this issue stressed the lack of state government neutrality during strikes. The economics of labor's position in relation to management was frequently cited as [19] a "war of attrition" during which both sides suffer economic losses. The point made clear by managers was the alliance of government and labor on one side of a labor dispute against industry as essentially destructive of the neutral role that government should play. Additionally, some managers felt that availability of benefits during strikes tended to make industry settle prior to the end of the six-week penalty period, for experience had demonstrated a lack of incentive for workers to settle disputes while collecting unemployment benefits. In this sense, benefits to workers on strike tended to prolong strikes.

2. *Unions should be called on to rely on union resources during labor disputes, such as union "strike funds," rather than employer-financed Unemployment Compensation.*

The thrust of this response was a rejection of the principle of the financing of strikes through employer-financed

*Plaintiffs' Exhibit 317*

Employment Security funds. Employers felt an essential absurdity in their position of paying workers from employer contributions to a fund which prolonged strikes, which caused losses in production and profits for those same employers.

3. *Labor laws put Rhode Island industry at a disadvantage in competing with employers in other states.*

Although not central to the issue of unemployment compensation benefits to workers during strikes, managers [20] strongly expressed the opinion that too many restraints were placed on industry by state agencies. The specific complaint most often mentioned was the administrative time consumed by filing requests for special permits from state and local government.

4. *Rhode Island Unemployment Compensation law places Rhode Island business at a distinct disadvantage in competition with employers in other states.*

A recurring theme in many interviews with businessmen about "business climate" was that it was nationally known that only two states, Rhode Island and New York, make unemployment benefits available to striking workers. This in the view of the business community surveyed creates an unfavorable image for the state. Several managers cited examples of industries that had definite policy against locating plants in a state that offered benefits during strikes. The variation in laws on unemployment benefits between states gave some states a clear advantage for maintaining existing industry and recruiting new industries. Since this is the case, the managers point out, then economic development in Rhode Island will lag until laws in Rhode Island match laws in other states in this regard.

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[PLAINTIFFS' EXHIBIT 321; Strike Preparation Manual, American Society for Personnel Administration, 1974; pages 1-2, 6-9, 15-16]

# strike preparation manual

No two strikes are identical.

The American Society for Personnel Administration's Strike Preparation Manual is a management *guide* and it is not intended, nor claimed, to cover all circumstances or incidents which may or may not occur before, during or after an actual labor dispute.

It is intended as a thought-provoking instrument which will assist in prompting protective measures and an awareness of problems which may confront the struck, or about to be struck, company.

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c) Can you anticipate the severity of the union's demands?

d) What percentage of your employees might "go out?"

e) Does the union pay strike benefits? If so, how much and when do payments begin?

f) Are strikers eligible for state unemployment compensation, food stamps, welfare?

g) If applicable, would other unions respect your union's picket line?

## B. Second stage strike preparations during final weeks of bargaining.

1. *Urgent* questions which must be answered by the company about the company:

   a) Does the negotiations committee have true authority?

   b) Does your management honestly believe its position is morally right?

   c) When is it the right time to communicate your position to all employees?

   d) Is the company really prepared to hold out when it begins to hurt?

   e) Will you continue to operate during a strike and with what personnel?

   f) What is the priority sequence for scheduling production during a strike situation?

   g) What are the company's chances of winning?

2. *Urgent* questions which the company must answer about the union:

   a) What do you think the union is really after?

   b) What promises has the union made to rank and file?

   c) Do union negotiators/representatives control the membership or does the membership control the negotiators?

   d) What is the strength of the union to take a strike and for how long a period?

e) How big is the union's "war chest"?

f) How long can employees be expected to hold out in spite of installment payments, rent, living expenses, etc.?

g) Many labor leaders concede that sometimes a strike is a much needed catharsis. A strike is sometimes called for purposes other than the reason announced relative to a particular issue. Therefore, it is well to realize that a strike may be the result of unrest within the labor organization; a proving ground for union leadership; a sharing of hardship which may help weld the union organization; a high-level confrontation precipitated by inadequate means of problem resolution at lesser levels of the organizations. Are these, or similar causes, possible factors of consideration for your "probable strike?"



# preparation for a probable strike

A. Preparatory departmental assignments and responsibilities.

1. Industrial relations

a) Coordinate with *all* departments and appropriate company officials to insure their awareness of the contract expiration date, general status of current negotiations and pre-strike assignments and responsibilites.

b) Again review stability and strike history of union.

c) Develop confidential master schedule for layoff of non-striking personnel where no production work is available.

d) Prepare a final plan for the approval of top management on the feasibility of, and plans for, operating the plant during a strike.

e) Coordinate appropriate arrangements for the transfer of work to other plants or divisions when required.

f) Coordinate initial plans for an orderly shut-down of operations and plant supporting facilities. This plan will be utilized subsequent to or coincidental with a strike, and subsequent to the time it may be determined that the plant will not be producing.

g) Consider establishing in-plant printing and mailing services and be sure they are adequately supplied. Insure that a primary or alternate printing and mailing service is available outside the plant.

h) Maintain an up-to-date list of all employees by name and address, categorized as follows: all hourly-rated employees, all non-exempt employees, all exempt employees.

i) Update list of all officers, stewards and members of the local union organization. This list should include

*Plaintiffs' Exhibit 321*

addresses, telephone numbers and pictures, if possible.

j) Maintain a list of appropriate union officials, business agents, regional directors, etc., together with their addresses and telephone numbers.

k) Prepare two sets of mailing envelopes pre-addressed to all employees, and separated as in (h) above.

l) Maintain a list of the officials in the community and county, particularly the Chief of Police, Sheriff's Office, City Attorney, etc. In the event of a strike, these individuals must be contacted and made aware of the situation and, when appropriate, the company's position.

m) Establish and maintain appropriate contact with governmental agencies — Federal Mediation and Conciliation Service and State Mediation Service.

n) Provide instruction to foremen and related supervisory personnel in regard to their responsibilities and conduct during the strike.

o) Prepare to contact State Unemployment Benefits Agency to prevent payment of benefit claims by strikers, if state law bars benefits to strikers.

p) Establish a management team of observers to man each entrance to the plant where picket lines may be established. Observers should be instructed to record all incidents, listing date, time, names, etc. Provide tape recorders.

q) Arrange for and have available the services of management personnel to act as photographers, preferably individuals who have had experience in strike situations. However, photographers acting for the company must be instructed not to take pictures of peaceful picketing or other peaceful activities. To do so may constitute an unfair labor practice charge and convert the strike to an unfair labor practice strike. Thus, picture-taking must be confined to the pictorial recording of incidents of mass picketing, violence or other unlawful acts.

r) Have available a sketch of the facility, indicating all entrances and exits, fence lines, window locations and building locations with dimensions drawn to scale.

s) Insure that management has selected one company representative to handle communications and act as sole spokesman with the media and inquiring





*Plaintiffs' Exhibit 321*

II. Pay and benefits

a) Immediately arrange to pay strikers any *wages* which they are due.

b) Discontinue the payment of fringe benefits, specifically insurance and pension premiums, providing the previous contract does not prohibit same and it is done on a non-discriminatory basis.

c) Do not pay vacation pay.

d) Notify the local employment service office in writing that a strike has occurred and indicate the name and address of each striking employee.

e) Review the files of employees currently drawing accident and sickness benefits, paying particular attention to the "expected" date of return to work for each employee so involved. Payments should cease on the "expected" date unless additional medical statements verify a continuing disability.

III. Communications

a) Advise all appropriate agencies and offices of the strike.

b) Advise all employees via a husband-wife home-addressed letter as to the company's position during negotiations, industry competitive position, cost of the union's demands, factual outline of the company's final position and the cost of its final offer.

c) Encourage the employees to return to work.

d) Inform all employees of their rights during a strike.

e) Review and approve for release by your designated "media man" all public and employee communications.

IV. The law

a) Know how to correctly replace or terminate strikers under state and federal law.

b) Know what the reinstatement rights and requirements are of replaced strikers.

c) Over-extend yourself to insure all individuals receive fair and equal treatment.

d) Be alert for and knowledgeable of actions by strikers which may constitute unprotected union activities.

e) Be keenly aware of conditions or actions by the

*Plaintiffs' Exhibit 321*

company which could lead to unfair labor practice charges against the company and possibly convert the strike from an economic strike to an unfair labor practice strike.

f) Know the "rights" of strikers (see Chapter I.)

V. Verification

Maintain your Strike Log as accurately as possible (by day, by hour) and in a confidential manner for possible future legal actions. Pictures taken or recordings made of unprotected activities or incidents are to be referenced to the log.

VI. Conduct

Communicate, observe, and enforce (by law agencies if necessary) the following:

a) People working in or having any business with the company have a right to pass freely in and out of the plant.

b) Pickets must not block a door, passageway, driveway, crosswalk or other entrance or exit to a struck plant.

c) Profanity on streets and sidewalks is a violation of the law.

d) Company officials, with the assistance of local law enforcement agents, should make every effort to permit individuals and vehicles to move in and out of the plant in a normal manner.

e) Union officials or pickets have a right to talk to people going in or out of a struck plant Intimidation, threats and coercion are not permitted, either by verbal remarks or physical action.

f) Sound truck should not be permitted to be unduly noisy — it should have a permit and must be kept moving.

g) If acts of violence or trespassing occur on company premises, plant officials should file complaints or seek injunctions. In cases of violence on one's person, the aggrieved person should sign a warrant for the arrest of the person or persons causing such violence.

h) Fighting, assault, battery, violence, threats, or intimidation are not permissible under the law, nor is the carrying of knives, firearms, clubs or other dangerous weapons.

VII. DO NOT:





[Plaintiffs' Exhibit 322]

LOCAL UNION NO. 77

International Brotherhood of Electrical Workers

*Office Address*
1718 Melrose Avenue
Seattle, Washington 98122

*Mailing Address*
Box 1309, Capitol Hill Sta.
Seattle, Washington 98112
323-4505

May 31, 1974

To: *All members of Local 77 IBEW employed at Puget Sound Power & Light Co.*

• • • • •

The payment of unemployment compensation, as you probably know by now, has been turned down. It is *very important,* however, that you keep reporting to the unemployment agency as we are appealing that decision.

A good example is that of the Shell Oil Refineries strike. [2] Those people on strike had applied for unemployment compensation and were turned down. That decision was appealed by their Union and it was finally decided that they would in fact receive their unemployment compensation, *but only those who kept reporting.* Those who didn't report lost out. Again, we urge you to keep reporting to your local unemployment office.

*Plaintiffs' Exhibit 322*

Food stamps are being obtained by some members and we urge you to apply for them right away if you have not already done so. You have paid into the fund for food stamps and now that you need them it is only fair that you receive benefits from it.

• • • • •

Respectfully and Fraternally submitted,

/s/ ROBERT P. TAYLOR

Robert P. Taylor
Assistant Business Manager
Local 77, IBEW

RPT/lr
opeiu#8afl-cio



[PLAINTIFFS' EXHIBIT 325]

Legislative Document (1960) No. 32

STATE OF NEW YORK

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# REPORT

# OF THE

# NEW YORK STATE

# JOINT LEGISLATIVE COMMITTEE ON

# INDUSTRIAL AND LABOR CONDITIONS

For the Year 1959–1960

Unemployment Insurance Law. Under this amendment, the same progressive schedule of tax rates (increasing 15/100 of 1% per year) which the Federal government would start to impose on New York employers in 1964 to recover its money if no repayment were made would be applied under New York law starting in 1960 and running through September 1963. However, no employer would be taxed an amount in excess of the TUC benefits his employees received plus the administrative costs allocable thereto.

Supporting Statement on Proposed Amendment

**Repeal of Filing Fee for Employer Appeals**

The required $10 deposit which an employer must pay for an appeal to the referee and $25 for appeal to the appeal board discourages bona fide appeals—particularly on the part of small employers. The cost of preparing the case and attending the hearing is in itself a deterrent to a specious appeal; and the posting of an additional deposit is unjust and discriminatory. There are so few appeals by employers in New York—in absolute numbers and, even more strikingly, in comparison to the number of claimant appeals, that it is obvious that many erroneous decisions must be going unchallenged. New York and Rhode Island are the only two states where employers are required to pay a deposit to exercise their legal rights. This requirement is unjust, discriminatory and harmful to the unemployment insurance program; and it should be repealed.

Statement of Joseph Molony, on Behalf of the United Steelworkers of America

I think I should preface my few remarks by saying that I and my union support the position taken by Mr. Corbett of the State AFL-CIO, and I come to New York with some of my colleagues this morning deeply concerned with what I hear and with what I read in newspapers regarding the future of our social legislation in the State of New York. I listened attentively to Mr. Williams earlier and there he made reference to the fact that a great number of steelworkers, whose strike has been interrupted through great sums of money from the Unemployment Insurance Fund. We of the Steelworkers are also deeply concerned with what we read regarding the utterances of the Commissioner of Labor, former Dean of Cornell, Mr. Catherwood. Here some months ago he was over in the City of Buffalo visiting us there and talking with a reporter for the morning newspaper, he announced the admonition, giving the most careful attention and study to the Unemployment Insurance Law as is related to strikers, to expectant mothers and to retirees. He said that he was studying this very carefully and it occurred to me and to many others that his study might not be made with the thought in mind of improving the benefits to these



three categories of people but rather that they might be denied benefits which they now enjoy.

I would like the record to show that in choosing unemployed people unemployed by reason of a strike, choosing expectant mothers, and pointing to elderly people on pension, that the distinguished Commissioner of Labor certainly was not choosing very formidable opponents. He might well address himself to other parts of the legislation or other groups having connection with industrial plants. He too prefaced his remarks that the Unemployment Insurance Law should be revised and tightened, I believe his word was, and the same kind of treatment should be accorded to the Workmen's Compensation Law and other parts of our social legislation because in his opinion and in the opinion of the administration and a great number of people it was felt that the climate of our state is not good for industry. Well, there are two sides to that coin. It seems to me of equal importance that our legislators should keep in mind that the State of New York should be made and kept a good place not alone to establish industry and to conduct industry but also a good place in which to work. I happen to be a representative of the United Steelworkers of America. We engaged ourselves in a great strike nationwide some months ago. The strike I assure you, and I don't think you want me to debate the merits of the steel strike here because I don't have the time or perhaps the patience at this time, but the strike in our opinion at least was forced on the union. But that be as it may, the members of our union in our judgment were forced on strike because of the onslaught of the steel masters on our working rules and the members of our union suffered great hardship for almost two months until such time as they were able to draw their benefits from the Unemployment Insurance Fund.

Now it has been proposed by representatives of the administration and again by Mr. Williams representing a segment of industry in the State that strikers be barred from receiving unemployment insurance. It's conceivable that to do so might lessen the burden of taxation on the employer, although I rather question that. I am not armed with too many figures but my best guess is that the unemployment insurance payment to the steelworkers for the entire period of our strike, at lease the compensable period, did not exceed $11 million and contrasted with that was the payment of $500 million during the period of recession in 1958. So even if strikers were barred from receiving unemployment insurance I am not too sure that the impact would be too great on the taxes which employers presently pay. New York State is happy that it has a solvent fund unlike many other states and to keep it solvent the taxation would have to remain at about the present level. In the event, however, that the State Legislature in its wisdom but not in its charity should remove benefits from striking employees or for that matter any employee involved in an industrial controversy which includes a lockout by his employer, if he were denied these benefits then it is not to be unexpected if such people might easily

become public charges because the average working man in our State is unable to accumulate sufficient savings to carry him for any extended period of either layoff, lockout or strike. So, it is conceivable that he might become a public charge. Then we would have the extraordinary situation that the employer might also conceivably be relieved of some taxation but the people of the entire State would then be subject to taxation to assist these people who were in distress as a result of lockout or strike.

So I'm here to express to you and to your distinguished colleagues the feelings of the membership of my union, and the feelings I do believe as expressed by Mr. Corbett of all of labor that we are unalterably opposed to denying a striker unemployment insurance.

I am not primarily here as a champion of expectant mothers or old people but from my understanding of the law, which is not too broad, these expectant mothers who do receive unemployment insurance must meet certain and rather vigorous requirements by the unemployment insurance offices. The same applies to retirees and my understanding of the law is that it must be involuntary retirement before they are eligible. The savings to the great State of New York do not justify an onslaught on these good people. I think that the Unemployment Insurance Law which was passed in 1935 and which I believe became effective in January of 1938 was enacted into law by kindly people in a spirit of goodliness and charity. It should be administered in the same kind of a benevolent spirit. It should not be used in an effort, and it should not be changed in an effort, to attract industry to our great State.

I am well aware that there are many states in the union which pay less who have laws not near as liberal as ours but with the passage of years, New York State no longer commands the proud position which it once held of being the most liberal, the most forward thinking of all states in the union. In relation to workmen's compensation, I believe we are at the bottom of all industrial states and there are many states—Michigan, California—which pay far more liberal benefits than does our State. It is true that we can and do meet competition from certain others states who have very meager benefits but for us to adjust ourselves to these states and to these kind of people, the kind of legislatures who pass such laws, to me is not true competition, rather it is competition in degradation. Rather it is for organized labor across the land to bring those states which have inadequate social laws to our level and it is our job in the State of New York to at least keep pace with states such as Michigan and California.

Now I pray and plead with you gentlemen that when you go to Albany in January, you give consideration and that you listen to the cries of the steelworkers. We have completed 116 days of strike. We are presently working under an injunction. I pray that we do not have to renew our strike in order to preserve our position next January, January 26th. If unfortunately and tragically we must renew the strike by the vote of the people involved, that is how it's going to be done. Then it would be a disaster.



It would be an unkind thrust. It would be damaging beyond description to the Steelworkers Union if the State Legislature changed the law in the midst of this great strike and denied our membership the right to unemployment insurance. I beg that you consider that as you consider the many proposals which must be before you having to do with unemployment insurance, consider the welfare and well being of approximately 38,000 citizens of our State.

We receive supplemental unemployment benefits in conjunction with the receipt of unemployment insurance but, S.U.B., as we call it, is specifically barred in the event of strikes.

I do not know whether this has been stressed or not by representatives of labor but this Unemployment Insurance Law of ours not alone gives a lift to the man who is out of work but also is of great value to our commerce and our industry as a whole in the State of New York and if you tie that in with the supplemental unemployment benefits which our union has been able to negotiate with the steel companies it amounts to, in payments, to approximately 65% of a man's earnings; that means that the average steelworker will be receiving approximately $65 to $70 a week during the periods of involuntary layoff which he pours back into our economy and which keeps small business people and professional people going. So, it has that added benefit, as you well know.

[PLAINTIFFS' EXHIBIT 328; Transcript of 1974 Recorded Telephone Message; Rochester]

Monday, December 16, 1974—5:00 P.M.

Local 1170 is now distributing turkeys (20-22 pounders) for all its members of Local 1170. Also if the members prefer ham, at a minimum cost of $2.00 (8-10 pounders), hams are available. All members must go to the Crisis Center to obtain the authorization card to receive this Christmas Day dinner. The Company might want to spoil our Christmas, but the members of Local 1170, C.W.A., will march ten feet tall right through the holiday season and into unemployment insurance. The Company is misleading the membership of Local 1170, C.W.A. The employees of the Plant Department are reasonable people but the Company thinks that we are stupid while we are fighting for our justice. Just our fair share. After all it was the Plant Department that makes the profit for the Company, the Company wants it all. We must have our fair share.

This is Local 1170, C.W.A. thanking you for calling the tape, the place we tell the truth. Don't forget the Christmas Party December 21, 1:00 P.M. here at center.



[PLAINTIFFS' EXHIBIT 331; Transcript of 1974 Recorded Telephone Message; Rochester]

Tape Release Monday, December 30, 1974

All members who have not received their $50 Christmas bonus will have until 12 noon December 31st to receive it. This is under instruction of the National Union. The National Union has ordered that Local 1170, CWA, circulate petitions to the citizens of Rochester and the suburban areas requesting that the Public Service Commission of the State of New York hold up the Company's temporary rate increase until the strike is settled. All members and their families are urged to fill out and sign these petitions and return them to the Union Office.

Arrangements are being made with the State of New York Unemployment Bureau to start signing up for unemployment insurance, which as of today is 11 days away. As soon as we have the system established all members will receive the official word on this tape.

This is Local 1170, CWA, the place where we're still telling the truth.

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[PLAINTIFFS' EXHIBIT 332; Transcript of 1975 Recorded Telephone Message; Rochester]

Monday, January 6, 1975 3:50 P.M.

There will be a letter in the mail tomorrow Tuesday, January 7th to all members spelling out the procedures to be followed to apply for unemployment insurance. These rules and regulations have been established by the State of New York Unemployment Department and must be followed.

*Plaintiffs' Exhibit 333*

To all members in Monroe County, Wednesday, January 15, 1975 is sign up day at the Crisis Center. To all other members, the addresses and times for sign up in your respective counties will be spelled out in the letter. Be sure to read the letter and follow the instructions. The Company continues its strike breaking activity. The Company is now contracting out all repairs of Electronic Secretaries to a local firm. Do you know the Company's other Union, Local 320 of the IBEW in Sylvan Lake, which the Rochester Telephone bargained with in April 1974 requires that all employees will receive two weeks vacation between July 1st and September 5th. The Company will not grant that to Local 1170, C.W.A. Please let's fill out those petitions and get them in.

This is your Local 1170, C.W.A. thanking you for calling the tape, the place where we are still telling the truth.

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[PLAINTIFFS' EXHIBIT 333; Transcript of 1975 Recorded Telephone Message; Rochester]

Monday, January 13, 1975

All people represented by Local 1170, C.W.A. living in Monroe County must report to the Crisis Center on Wednesday, January 15, 1975 to sign up for unemployment insurance according to the schedule mailed to all members. If you have any questions, call the Union Office, 647-1170, that is 647-1170. The Crisis Center has a few food specials this week. Large eggs—70¢, potatoes, 50 pounds for $2.00, onions—25¢ a bag, other specials to follow The Company's foremen are now calling the strikers, asking them to come back to work. To date, everyone has told them to go to



*Plaintiffs' Exhibit 334*

hell. Remember—everytime you see a management person working, they are doing your work. If they did not do your work, the strike would be shortened.

This is your Local 1170, C.W.A. thanking you for calling the tape, the place where we are still telling the truth.

---

[PLAINTIFFS' EXHIBIT 334; Transcript of 1975 Recorded Telephone Message; Rochester]

Wednesday, January 15, 1975

The City Council of the City of Rochester last night passed a resolution urging the Public Service Commission of the State of New York to hold the Company's temporary rate increase up until the strike is settled. The Company is not giving 100% telephone service therefore why should the subscriber pay for it. The City of Rochester notified the Chairman of the Public Service Commission of this resolution. 945 members of Local 1170, C.W.A. living in Monroe County, today signed up for unemployment insurance benefits. Thank you Mr. Company for nothing.

All other members have signed up in the counties where they live. The members of Local 1170, C.W.A. would rather be working but the Company does not want that. Again, thank you Mr. Company for nothing. But let me tell you like it is—you are not going to starve us back to work, you must bargain with us an acceptable contract the majority of the membership will accept.

This is Local 1170, C.W.A. thanking you for calling the tape, the place where we are still telling the truth.

[PLAINTIFFS' EXHIBIT 337]

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS

Telephone Local Union 1357
677 Ala Moana Blvd. Room 815
Honolulu, Hawaii 96313
Phone 531-0288

IBEW 1357 STRIKE NEWS BULLETIN

May 11, 1974

As we enter the second week of the strike, *there is every indication* that we are running a successful strike. *This means that we are operating at more than 90% of total strength on our picket lines* throughout the State. So far we have evidence that a few, happily *very few, of our members have become scabs and are crossing our picket lines.* We know who these people are even though the company attempted to shield them by transporting them to and from work in vans which had the windows covered with newspaper.

• • • • •

We had hoped to give you some additional information on benefits today, but until the company answers certain questions for us we are at a loss as to what information to give you.

Our crews are hard at work gathering information and completing forms for unemployment compensation. *If you have not applied, contact your picket captain immediately*



*Plaintiffs' Exhibit 337*

*and he or she will make arrangements for you to meet with one of our Union members assigned to processing unemployment compensation applications.*

• • • • •

[2] The State Federation of Labor, the two other IBEW locals, the ILWU, the Teamsters and many independent unions are supporting our strike, These organizations will not cross our picket lines, they'll picket with us and give us other supportive assistance.

*Don't forget, do not listen to rumors. Be informed, but with factual information you receive from your shop steward, picket captain or the Union office.*

Again, on behalf of the Executive Board, your cooperation is making this strike a success. Aloha and mahalo.

Sincerely and fraternally,

/s/ JOHN F. GUZMAN

John F. Guzman
Business Manager-
Financial Secretary

[PLAINTIFFS' EXHIBIT 339]

September 16, 1974

An Open Letter to our brothers and sisters working at Hawaiian Tel

WE HAVE A JOB TO FINISH!

Sisters and Brothers,

We have come out of a long, hard but spirited strike, during which we discovered each other and the power and strength of our unity.

During that strike we received the backing, support and encouragement of many workers, unions and community organizations which really boosted our morale and efforts.

We settled for what we could get, after two contract rejections, and came back to work. We elected new leadership which we hoped would get our union really together and make it strong and ready to defend our hard-won gains. We knew we had to be more prepared for the next round of struggle.

The Bosses Stab Us in the Back

But the ink was hardly dry on the contract when the G.T.&E. bosses showed us what they thought of the truce. They sent their fancy lawyers to federal court to sue the State to prevent payment to us of our unemployment compensation, which we were entitled to under State law. By our labor we earned the profits and paid the state taxes that finance the State Unemployment Fund. Now the company, with the help of the courts and their Big Business allies in



*Plaintiffs' Exhibit 339*

Hawaii and all over the U.S., is trying to rob us of our benefits, to the tune of hundreds of thousands of dollars, and trying to undermine our ability and right to strike in the future.

Can We Afford to Do Nothing?

Now we are receiving our wages and increases and some of us do not care much whether we get our unemployment or not. Some say even if we win this court case in Hawaii, the company will tie up our unemployment benefits for years, taking it all the way to the Supreme Court. That may be true, but if we win, the company will have to bear more of the court costs and will be on the defensive, not us. Some say it would be better to concentrate on taking away Aloha United Way contributions from the company's drive, and give individually or through the union. We are not against this idea, but feel we must not neglect the more important issue that faces us.

This Issue Affects All Workers

We must realize that all workers in Hawaii and in 25 other states will be hurt by a bad decision by Judge Pence. Don't we have a responsibility to carry our struggle through, now that the bosses have picked up the club to use against us and all workers, and beat back this attack and defend our right and ability to strike? Don't we have a responsibility to the many workers who supported us when we were on strike to make sure that our bosses' action in court doesn't cripple their own strikes in the future?

*Plaintiffs' Exhibit 339*

Don't Leave It to the Courts and Lawyers

Is it enough to leave this important issue up to the judge and a few lawyers, able though they might be, to argue in an empty courtroom?—when hundreds, thousands, even millions of our fellow workers will be affected by the decision!

We learned not too long ago what happens when we leave an important matter like strike demands to a so-called impartial mediator. He tried to undermine our strike and make us accept a lousy offer. We have learned to unite and fight; we know through united action we are stronger than the bosses and that working class solidarity is built. The big bosses are united—the phone company, the Employers' Council and the Chamber of Commerce are ganging up to try to teach us a lesson and hurt all workers. They represent the class that rules our society. We are the people that produce their wealth, all the while struggling for just enough to get by on. Well, we have had it up to here! It's time to unite with other workers who are under attack by these same class of bosses—dock workers, striking machinists whose jobs were stolen by military scabs, and all workers whose wages and conditions are being eaten away by inflation while the corporations get fat.

JOIN IN OUR RALLY THIS SEPTEMBER 23, 4 P.M. to 6 P.M.

In front of the FEDERAL COURT HOUSE on King Street and Richards Street.

Music, short speeches, and mass picketing.



*Plaintiffs' Exhibit 342*

This demonstration is endorsed by:

- Hawaii AFL-CIO Executive Board
- Carpenters' Union, AFL-CIO (Walter Kupau)
- Machinists' Union, AFL-CIO
- Ironworkers' Union, AFL-CIO
- Retail Clerks, AFL-CIO
- Oahu Division, ILWU (subject to local ratification)
- Labor-Community Alliance

Mahalo and solidarity,

Gwen Pascua
Chairperson
Workers Committee to Defend the Right to Strike
1565-A Moani Street, 96819 (841-0077)

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[PLAINTIFFS' EXHIBIT 342]

NEW YORK STATE DEPARTMENT OF LABOR — DIVISION OF EMPLOYMENT

INTER-OFFICE MEMORANDUM

To: Mr. M. Rourke, Dist. Supt. U. I.
From: W. Lakey
Subject: Outside Speaking
Office LO 17, Newburgh
Date August 30, 1971

At the request of Mr. Ray Terwilliger and Mr. Al Bockemuhl of the Communications Workers I gave a group

Benefit Rights Interview to their members at the Carpenter's Hall on W. Parmentier Street, Newburgh on Sunday evening, August 29, 1971 at 8:00 P. M.

/s/ WALTER M. LAKEY
Walter M. Lakey, E. S. Manager

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[PLAINTIFFS' EXHIBIT 345; pages 18-20]

LABOR RESEARCH REPORT
1973—No. 19
DECEMBER 1973

# THE INDUSTRIAL CONTROVERSY PROVISION OF THE NEW YORK STATE UNEMPLOYMENT INSURANCE LAW
1935-1973

NEW YORK STATE DEPARTMENT OF LABOR
Division of Research and Statistics
State Office Building Campus
Albany, New York

• • • • •

## APPENDIX C

## EFFECT OF WORK STOPPAGES ON THE BENEFIT COSTS OF UNEMPLOYMENT INSURANCE

Under the New York State Unemployment Insurance Law, persons unemployed because of a work stoppage in their establishment are not eligible for insurance benefits





until seven weeks have passed; there is, in addition, a one-week waiting period. Then, after the strike has lasted eight weeks, workers are eligible for benefits.[1]

About 9.8 percent of all work stoppages during the 26 years from 1947 to 1972 lasted longer than eight weeks. These stoppages involved 13.8 percent of all workers unemployed because of a strike in their establishment and 51.0 percent of mandays made idle. A total of 1,240 stoppages involving approximately 724,612 workers and 43,524,000 mandays idle fall into this category.

In an average year during this period, there were 47 such stoppages involving 27,900 workers, who were out an average of 12.0 weeks. Therefore, on the average, these workers were eligible to receive 4.0 weeks of benefits.

The maximum weekly benefit increased at intervals of two to five years, from $21 in 1947 to $75 in 1970. The average maximum weekly benefit over the 26 years works out to $44.80. Therefore, the total of benefits which could have been paid to those unemployed because of strikes in their establishments averaged $5.0 million a year in this period —27,900 workers receiving 4.0 weeks of benefits at $44.80 per week. This is approximately 1.4 percent of the $355 million in benefit costs during the average year of the period.

Data on unemployment compensation received by strikers in 1963, 1964, 1966, and 1967 show that their weekly bene-

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[1] Workers who previously established a benefit year do not have to serve the one-week waiting period. The strike data include both workers who are on strike and those in the establishment who are laid off because of the work stoppage. In states that have a prohibition against any benefits for strikers, this second group would be eligible; in New York both groups are subject to the seven-week disqualification.

fits amounted to 95.6 percent of the maximum. An *adjusted* average maximum weekly benefit, therefore, can be calculated at $42.83 for the 1947-1972 period (95.6 percent of $44.80).

But not all workers unemployed because of strikes in their establishments remain without jobs for the eight weeks and not all receive maximum benefits. Some take on jobs in other areas or other fields, and some do not file. An estimated 5 percent of unemployment insurance claimants drop out of the claimant category each week. Therefore, during eight weeks almost 34 percent[1] would not have appeared for benefits. On this basis, it may be assumed that only about 66 percent of those involved in work stoppages receive benefits.

The assumption of a 5 percent weekly dropout rate applies to the "average" situation. Experience in individual strike situations may vary a great deal, being affected by the availability of other jobs and the individual's need for seeking or accepting them, the availability and amount of union strike benefits, the industries in which the strike occurs, and other factors. Thus, construction workers on strike during their busy season may have little difficulty in finding jobs in other communities.

For example, during 1963, 1964, 1966, and 1967—years for which data are available—only 48.4 percent of the 71,300 persons involved in strikes that lasted more than eight weeks came in for benefits—a weekly dropout rate of about 8.5 percent. On the other hand, weekly dropout rates of

[1] This number is less than 40 percent (8x5) because the 5 percent dropout rate each week is figured on a progressively smaller base.



2.5 percent and 4 percent were reported in two recent large strikes in manufacturing firms.

Obviously, some adjustment has to be made for these factors in calculating actual benefits; and since annual data during the period are not available, adjustments in the accompanying table assume a 5 percent weekly dropout rate, and benefits of 95.6 percent of maximum levels.

On the basis of these assumptions, the estimate of benefits received by strikers is calculated at 63.4 percent of the maximum levels (95.6 percent of 66 percent).

ESTIMATED EFFECT OF WORK STOPPAGES ON THE BENEFIT COSTS OF UNEMPLOYMENT INSURANCE (h)

| Estimation step | Average 1947-72 | Average 1947-57 | Average 1958-72 | Average 1963-72 | 1970 | 1971 | 1972 (i) |
|---|---|---|---|---|---|---|---|
| (1) Number of all reported stoppages per year | 481 | 521 | 451 | 451 | 570 | 399 | 522 |
| (2) Number of workers involved in such stoppages | 202,000 | 175,300 | 222,000 | 233,000 | 372,000 | 253,000 | 139,000 |
| (3) Number of stoppages per year lasting more than 8 weeks | 47 | 52 | 43 | 41 | 55 | 57 | 45 |
| (4) Number of workers involved in such stoppages | 27,900 | 23,500 | 28,900 | 25,300 | 62,446 | 15,886 | 66,726 |
| (5) Average duration (weeks) | 12.0 | 11.6 | 13.2 | 15.5 | 10.2 | 16.5 | 21.9 |
| (6) Average number of weeks of benefits received | 4.0 | 3.6 | 5.2 | 7.5 | 2.2 | 8.5 | 13.9 |
| (7) Average maximum benefit (per weeks) (a) | 44.80 | 29.23 | 56.22 | 62 | 75 | 75 | 75 |
| (8) Total maximum benefits per year (millions) (b) | 5.0 | 2.5 | 8.4 | 11.8 | 10.3 | 10.1 | 69.6 |
| (9) Percent of all benefits (c) | 1.4 | 1.1 | 1.9 | 2.6 | 2.0 | 1.3 | 9.5 |
| (10) Adjusted number of workers involved (d) | 18,800 | 15,580 | 19,750 | 17,650 | 41,400 | 10,532 | 53,029 |
| (11) Adjusted average benefit per week (e) | 42.83 | 27.94 | 53.75 | 59.27 | 71.20 | 71.20 | 71.20 |
| (12) Estimated benefits per year (millions) to persons affected by work stoppages (f) | 3.2 | 1.6 | 5.5 | 7.8 | 6.5 | 6.4 | 52.5 |
| (13) Percent of all benefits (g) | 0.9 | 0.7 | 1.2 | 1.7 | 1.3 | 0.8 | 7.2 |

a. The average of the maximum weekly benefits paid during the period. Where the maximum changed during the year, an average was computed: for example, in 1970 the maximum was $65 during the first 8 months and $75 in the last 4 months; the average for the year was $68.33.

b. Item (8) equals the product of items (4), (6), and (7).

c. Item (9) equals item (8) divided by total benefit payments.

d. Assuming that 5 percent of those involved in work stoppages will find other jobs each week; hence, after 8 weeks, only 66.3 percent will come in for benefits.

e. Benefits paid to strikers in 1963, 1964; 1966, and 1967, were 95.6 percent of maximum benefits in those years. (it is assumed that this relationship held in all years.)

f. Item (12) equals the product of items (6), (10), and (11).

g. Item (13) equals item (12) divided by total benefit payments.

h. The data are for work stoppages ending during each of the specified years. On this basis, for example all of the time lost in the strike against the New York Telephone Company, which ended in February 1972, was included in the 1972 data even though the strike began in July 1971; on the other hand, the elevator constructors strike, which began in July 1972, was excluded because it did not end until January 1973.

i. Data available for the Telephone Company stoppage, indicated that more than 66.3 percent (footnote (d)) of these workers came in for benefits. About 9,000 workers were added to line 10 to reflect this fact and data for the averages were adjusted accordingly.







[PLAINTIFFS' EXHIBIT 353; Article from UAW AMMUNITION, Official Publication of UAW's Education Department, June 1957]

[9] INDUSTRIAL UNIONS ADAPT TO THE AGE OF AUTOMATION

*How UAW industrial union principles have evolved to meet the great challenges posed by employer opposition the development of technology, and the appearance of automation.*

*PART TWO OF*
*HEART OF THE UNION*
A Core Study Program

• • • • •

The two UAW films, "Building the Auto Workers' Union" and "United Action" are different versions of the same event—the 1939 General Motors tool and die strike.

When GM and Chrysler were organized as the result of the sitdown strikes, the job was not done once and for all. The companies tried every strategy to break the union.

Ford, next on the list, with Harry Bennett in charge of a private secret police and an army of gangsters and thugs, also fished around in the backwaters of the UAW.

Some of the leaders of the new union, who had no union background, were personally ambitious, and easily misled.

*Secret Deal*

Among these was Homer Martin, first president of the union, who sought to establish a personal rule over the union, and in fighting to achieve dominance attempted to

make a secret deal with the Ford Motor Company and Harry Bennett.

A civil war ensued which the democratic leaders of the union finally won at the 1938 convention of the union in Cleveland.

Here a new president was elected, and a democratic safeguard put into the union constitution, the corporation councils through which the rank and file in each company control their relations with the companies they work for.

But the civil war in the union did not leave the UAW in complete control of bargaining.

Homer Martin, using his prestige as a former union president, left the UAW and led a number of local unions back to the AFL.

Seizing this opportunity, the General Motors Company refused to bargain with the UAW saying that it could not be sure which union faction represented the workers.

From October, 1938 to June, 1939 GM refused to negotiate with the UAW at all.

The union at the time, however, was weak, divided, and its members balanced on the edge of privation by long years of irregular employment and alternating recessions and depressions.

In this situation, the union's leadership decided to take advantage of the unemployment compensation law and called the tool and die workers out on strike alone.

Then under the law, production workers, who got laid off as the result of the shut downs which would certainly follow, would be entitled to unemployment compensation.



[10] This was planned to exert pressure on GM, since it would be caught tooling up for a new model. The production workers, it was foreseen, would be relatively cushioned by unemployment compensation payments.

Thus, a double set of facts made the strike strategy effective.

The unemployment compensation law then (since, the law has been amended so the situation does not apply) allowed workers in a plant on strike to collect unemployment compensation, if they were not parties to the dispute.

Secondly, the skilled workers were urgently needed by GM and were thus able to apply powerful economic arguments on the company.

Production workers at the time were either laid off, or about to be laid off, and without bargaining power at all.

Thus, the skilled workers were able to use bargaining power to help production workers who were without any bargaining power at the time.

Many people, it should be noted, think that situations like this will recur in the future, now that the auto industry is getting back to a feast-famine cycle (with the feasts very short indeed).

### *Phony Strike*

The Homer Martin AFL rump faction got wind of the strategy and tried to disrupt it by calling a strike of all workers in advance of the walkout.

UAW leaders asked the people to maintain union discipline and stay on their jobs until they had made their own decision.

The phony Martin strike failed, and in a few days was called off by Martin and his AFL faction.

One month later in July, after GM had continued to disregard all efforts by the union to bargain, the skilled workers, under UAW leadership, left their jobs at GM Tool and Die in Detroit.

They were soon followed by other GM skilled workers throughout the country.

As the strike began to bite, GM started to close down all over the country. The laid off production workers then collected their compensation. At the same time they thronged to picket lines to support the skilled workers' strike.

• • • • •

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[PLAINTIFFS' EXHIBIT 356; Transcript of 1974 Recorded Telephone Message; Rochester]

December 19, 1974—3:50 P.M.

The meeting in Albany through the Mediator in separate rooms between the Union and the Company. After the Union modified its position, the Company's position still remains the same. The Company will not move one inch. No further meetings have been scheduled. Plans will be made for the Christmas bonus of $50.00 from the National Union. Remember—as a Union member on strike you are entitled to a turkey or ham for Christmas. Go to the Crisis Center and sign up. Christmas is less than a week away. If you need toys or gifts for Christmas, go get them at the



Crisis Center. Our Christmas Party is two days away. See you at the Riveria Theater on Saturday, December 21 at 1:00 P.M.

This is your Local 1170, C.W.A. thanking you for calling.

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[PLAINTIFFS' EXHIBIT 358; Transcript of 1975 Recorded Telephone Message; Rochester]

Monday, May 12, 1975

For the past 23 weeks, 1500 members of the Communications Workers of America have been on strike against the Rochester Telephone Corporation. There has been a complete break down in negotiations and it looks as though the strike will continue for many weeks. Thousands of Rochester Telephone subscribers have been receiving less than full telephone service. In order to bring them all out, a resolution of this conflict, the Assembly's speedy committee on labor will hold a public hearing in Rochester at 10:00 A.M. on Saturday, May 24 at Monroe Community College, 1000 East Henrietta Road, Rochester to offer all parties concerned an opportunity to voice their concerns over the long strike. It is my feelings that the Assembly's standing committee on labor can serve the Rochester community in offering all parties an opportunity to public air their views on the strike. The strike becomes important when we realize that 1500 workers of the Rochester Telephone Company are capturing the public treasury in a time when more than 760,000 people are unemployed.

[PLAINTIFFS' EXHIBIT 366]

For release:
Morning papers, Tuesday,
June 15, 1971

FEDERAL MEDIATION AND
CONCILIATION SERVICE

"The Changing Nature of Strikes"

J. Curtis Counts, Director
Federal Mediation and Conciliation Service

NATIONAL ASSOCIATION OF MANUFACTURERS
Institute on Industrial Relations

Grand Teton National Park, Wyoming
o O o
June 14, 1971

• • • • •

[5] While it is clear that historically strikes take their characteristics and meaning from the total social, economic, and political environment in which they occur, there are four categories of factors which I believe contribute significantly to their changing nature.

[6] One of these I choose to call external factors—external in the sense that these influences stem from or are developed outside the specific contractual interest and control of the parties. This category embraces such things as the state of the economy, the pressures of today's inflation during a period of increased unemployment, the pattern of high settlements upon the mood and attitudes



*Plaintiffs' Exhibit 366*

of managements and work forces, and the impact of imports and the increased efficiency and productivity of foreign competitors upon the markets. The category also includes the laws that structure bargaining and those that impinge upon the economic pressures that are part and parcel of any strike situation.

In this latter instance, I would point to those state unemployment compensation laws that provide unemployment benefits to striking employes and to state and federal legislation that provides food stamps and other welfare assistance to strikers.

Dr. Herbert Northrop of the Wharton School of Finance, is about to issue a study that deals with public support to strikers. Charts he has developed indicate that the number of persons in nonpublic assistance households who were issued food stamps in Michigan during the period of the automotive strike rose from a low of about 50 thousand [7] persons in September 1970, to a high of over 400 thousand persons in November of 1970.

In Delaware County, Pennsylvania, during the period of the Westinghouse-Lester-UE strike, August 28, 1970 to January 25, 1971, the number of persons participating in a program of general assistance rose from less than 2,100 persons to about 4,500 individuals.

I believe it is valid to conclude that these measures changed appreciably the economic pressures attached to the strike. Certainly, the nature of strike benefits was changed from one of union-employe responsibility to one of government assisted responsibility.

• • • • •

[Plaintiffs' Exhibit 367]

Sept. 5, 1971

To The Members of Local 1107

Fellow Members:

The rejection of the contract with a vote to strike by the New York Plant Unit on August 14, was a precedent setting first under C.W.A. Not since the old days of the U.T.O. had New York Plant people rejected a contract and at the same time voted to strike.

• • • • •

[3] We are reaching the point where we will be receiving some help from Un-employment etc. It is therefore best to continue the fight and the unity you have displayed thus far.

• • • • •

[4] Thank you for your continued support. We will keep you informed of further developments.

Sincerely and fraternally,

Charles Black

cb:rfk



[Plaintiffs' Exhibit 369]

## MEAN LENGTH OF STRIKES BY LOCATION FOR ALL STRIKES, STRIKES OF EIGHT WEEKS OR LESS AND MORE THAN EIGHT WEEKS

| | *New York* (1) | *Rhode Island* (2) | *All Others* (3) |
|---|---|---|---|
| *All Strikes* | | | |
| Mean Length (Weeks | 3.7 | 3.7 | 3.6 |
| Standard Error (Weeks) | (0.13) | (0.37) | (0.03) |
| Number of Strikes | 2,273 | 186 | 26,571 |
| *Strikes of Eight Weeks or Less* | | | |
| Mean Length | 1.8 | 2.1 | 1.9 |
| Standard Error | (0.04) | (0.15) | (0.01) |
| Number of Strikes | 2,002 | 165 | 23,000 |
| Percent of All Strikes | 88.08 | 88.71 | 86.56 |
| *Strikes of More than Eight Weeks* | | | |
| Mean Length | 17.2 | 16.0 | 14.7 |
| Standard Error | (0.59) | (1.01) | (0.12) |
| Number of Strikes | 271 | 21 | 3,571 |
| Percent of All Strikes | 11.92 | 11.29 | 13.44 |

Source: U.S. Department of Labor, Bureau of Labor Statistics, Computer Tape of Analysis of work stoppages, 1968-73.

[Plaintiffs' Exhibit 370]

## MEAN LENGTH AND NUMBER OF STRIKES FOR STRIKES OF MORE THAN EIGHT WEEKS

| *State* | *Mean Length (Weeks)* | *Standard Error* | *Number of Strikes* |
|---|---|---|---|
| | *(1)* | *(2)* | *(3)* |
| New York | 17.243 | 0.5928 | 271 |
| Rhode Island | 16.034 | 1.020 | 21 |
| *States With 100 or More Strikes* | | | |
| Pennsylvania | 13.991 | 0.3123 | 423 |
| Ohio | 14.680 | 0.3672 | 332 |
| California | 14.849 | 0.4361 | 278 |
| Michigan | 15.426 | 0.5815 | 212 |
| Illinois | 13.937 | 0.4475 | 210 |
| Missouri | 15.238 | 0.7389 | 145 |
| New Jersey | 13.901 | 0.6321 | 143 |
| Indiana | 14.681 | 0.8473 | 128 |
| Texas | 14.659 | 0.5632 | 113 |
| Massachusetts | 14.660 | 0.7958 | 110 |
| *States with 50 to 100 Strikes* | | | |
| Tennessee | 14.861 | 0.8035 | 99 |
| Wisconsin | 14.574 | 0.6240 | 96 |
| Kentucky | 14.367 | 0.6564 | 91 |
| West Virginia | 16.005 | 0.7739 | 84 |



*Plaintiffs' Exhibit 370*

| | | | |
|---|---|---|---|
| Alabama | 14.838 | 0.7925 | 74 |
| Florida | 15.084 | 0.8576 | 73 |
| Iowa | 14.303 | 0.8463 | 66 |
| Georgia | 14.787 | 0.7990 | 59 |
| Maryland | 14.906 | 0.8075 | 58 |
| Minnesota | 13.350 | 0.9426 | 58 |
| Connecticut | 15.061 | 1.0242 | 56 |
| Louisiana | 15.277 | 1.0155 | 52 |
| Washington | 16.003 | 0.9078 | 52 |
| *States With 50 Strikes or Less* | | | |
| Oregon | 13.633 | 0.6060 | 49 |
| Virginia | 16.114 | 1.2394 | 44 |
| Arkansas | 16.763 | 1.2426 | 38 |
| North Carolina | 15.147 | 1.2389 | 36 |
| Colorado | 13.853 | 1.4468 | 34 |
| Kansas | 15.437 | 1.3178 | 32 |
| Oklahoma | 13.235 | 0.7140 | 28 |
| Arizona | 12.537 | 0.6198 | 25 |
| Delaware | 15.526 | 1.0750 | 25 |
| Mississippi | 13.354 | 1.0818 | 25 |
| Nebraska | 16.634 | 1.4980 | 25 |
| South Carolina | 16.391 | 1.2981 | 19 |
| Montana | 14.462 | 0.8595 | 17 |
| Maine | 13.795 | 1.3075 | 16 |

| | | | |
|---|---|---|---|
| Idaho | 16,238 | 2.4928 | 15 |
| New Mexico | 14.238 | 1.3046 | 15 |
| Utah | 12.781 | 0.9477 | 15 |
| Nevada | 16.735 | 2.0936 | 14 |
| Alaska | 14.011 | 1.0951 | 13 |
| North Dakota | 13.538 | 1.3321 | 13 |
| South Dakota | 15.286 | 2.1519 | 13 |
| Vermont | 19.429 | 2.2757 | 13 |
| District of Columbia | 15.100 | 1.3405 | 10 |
| New Hampshire | 21.314 | 4.8625 | 10 |
| Hawaii | 15.464 | 1.8469 | 8 |
| Wyoming | 13.327 | 1.8153 | 7 |

Source: U.S. Department of Labor, Bureau of Labor Statistics, Computer Tape of Analysis of Work Stoppages, 1968-73.



ABLE 1 ... PROJECTED RESPONSES OF NONUNION AND UNION MEMBERS IN NEW YORK STATE TO THE QUESTION:

"Under New York State law, in industries covered by unemployment compensation, people who are out of work because of a strike become eligible for unemployment benefits after 8 weeks of unemployment. The maximum benefit is $95 per week, tax free. I am going to read you several statements about unemployment compensation. For each statement, please tell me whether you strongly agree, agree, disagree, strongly disagree, or are undecided.

"Because unemployment compensation is available to strikers in New York State, unions can achieve better settlements than they could otherwise."

| | Percentage of all respondents | Percentage of respondents who expressed opinion |
|---|---|---|
| **UNION MEMBERS** | | |
| Strongly agree | 11.7 (±2.8) | 14.3 (±3.4) |
| Agree | 49.8 (±4.6) | 60.9 (±4.8) |
| Disagree | 18.3 (±3.4) | 22.4 (±4.0) |
| Strongly disagree | 1.9 (±1.0) | 2.3 (±1.2) |
| No opinion | 18.2 (±3.4) | - |
| **NONUNION MEMBERS** | | |
| Strongly agree | 16.0 (±3.2) | 20.4 (±4.0) |
| Agree | 43.6 (±4.6) | 55.6 (±5.0) |
| Disagree | 16.2 (±3.4) | 20.7 (±4.2) |
| Strongly disagree | 2.6 (±1.2) | 3.3 (±1.6) |
| No opinion | 21.6 (±4.0) | - |

TABLE 2 ... PROJECTED RESPONSES OF NONUNION AND UNION MEMBERS IN NEW YORK STATE TO THE QUESTION:

"Under New York State law, in industries covered by unemployment compensation, people who are out of work because of a strike become eligible for unemployment benefits after 8 weeks of unemployment. The maximum benefit is $95 per week, tax free. I am going to read you several statements about unemployment compensation. For each statement, please tell me whether you strongly agree, agree, disagree, strongly disagree, or are undecided.

"Unemployment compensation enables strikers to hold out longer."

| UNION MEMBERS | Percentage of all respondents | Percentage of respondents who expressed opinion |
|---|---|---|
| Strongly agree | 11.1 (±2.8) | 12.7 (±3.2) |
| Agree | 49.9 (±4.4) | 57.0 (±4.8) |
| Disagree | 25.5 (±4.0) | 29.1 (±4.4) |
| Strongly disagree | 1.1 (±0.8) | 1.2 (±1.0) |
| No opinion | 12.3 (±2.8) | - |
| **NONUNION MEMBERS** | | |
| Strongly agree | 20.0 (±3.6) | 22.2 (±4.0) |
| Agree | 54.8 (±4.6) | 60.7 (±4.6) |
| Disagree | 14.2 (±3.2) | 15.8 (±3.6) |
| Strongly disagree | 1.2 (±1.0) | 1.4 (±1.0) |
| No opinion | 9.7 (±2.8) | - |



TABLE 3 ... PROJECTED RESPONSES OF NONUNION AND UNION MEMBERS IN NEW YORK STATE TO THE QUESTION:

"Under New York State law, in industries covered by unemployment compensation, people who are out of work because of a strike become eligible for unemployment benefits after 8 weeks of unemployment. The maximum benefit is $95 per week, tax free. I am going to read you several statements about unemployment compensation. For each statement, please tell me whether you strongly agree, agree, disagree, strongly disagree, or are undecided.

"Unemployment compensation forces management to settle a strike more quickly."

| UNION MEMBERS | Percentage of all respondents | Percentage of respondents who expressed opinion |
|---|---|---|
| Strongly agree | 5.6 (±2.2) | 6.6 (±2.4) |
| Agree | 37.6 (±4.4) | 44.4 (±5.0) |
| Disagree | 38.6 (±4.4) | 45.5 (±4.8) |
| Strongly disagree | 3.0 (±1.6) | 3.5 (±2.0) |
| No opinion | 15.2 (±3.0) | - |
| **NONUNION MEMBERS** | | |
| Strongly agree | 9.2 (±2.6) | 11.2 (±3.2) |
| Agree | 36.8 (±4.4) | 44.8 (±5.0) |
| Disagree | 33.5 (±4.4) | 40.7 (±5.0) |
| Strongly disagree | 2.7 (±1.2) | 3.2 (±1.6) |
| No opinion | 17.8 (±3.6) | - |

TABLE 4 ... PROJECTED RESPONSES OF UNION MEMBERS IN NEW YORK STATE TO THE QUESTION:

"I am going to ask you to imagine that, during the coming year, you and your fellow employees go out on strike. The strike is still on after 2 months have passed. Assume that the various sources of income available to you are food stamps, general public assistance or welfare, unemployment compensation, union strike funds. I would like you to rank these sources of income. Which would you be most likely to seek -- food stamps, general public assistance or welfare, unemployment compensation, union strike funds? And which source of income would you rank second? And third?"

Food stamps - ranking

| UNION MEMBERS | Percentage of all respondents | Percentage of respondents who expressed opinion |
|---|---|---|
| First | 3.6 (±1.6) | 3.8 (±1.8) |
| Second | 14.6 (±3.2) | 15.5 (±3.4) |
| Third | 48.1 (±4.6) | 51.0 (±4.6) |
| Fourth | 28.0 (±4.0) | 29.7 (±4.2) |
| No opinion | 5.6 (±2.2) | - |



TABLE 5 ... PROJECTED RESPONSES OF UNION MEMBERS IN NEW YORK STATE TO THE QUESTION·

"I am going to ask you to imagine that, during the coming year, you and your fellow employees go out on strike. The strike is still on after 2 months have passed. Assume that the various sources of income available to you are food stamps, general public assistance or welfare, unemployment compensation, union strike funds. I would like you to rank these sources of income. Which would you be most likely to seek -- food stamps, general public assistance or welfare, unemployment compensation, union strike funds? And which source of income would you rank second? And third?"

General public assistance or welfare - ranking

| UNION MEMBERS | Percentage of all respondents | Percentage of respondents who expressed opinion |
|---|---|---|
| First | 4.6 (±1.6) | 4.8 (±1.8) |
| Second | 13.3 (±3.0) | 14.0 (±3.2) |
| Third | 26.6 (±4.0) | 28.3 (±4.2) |
| Fourth | 49.7 (±4.6) | 52.9 (±4.6) |
| No opinion | 6.0 (±2.2) | - |

TABLE 6 ... PROJECTED RESPONSES OF UNION MEMBERS IN NEW YORK STATE TO THE QUESTION:

"I am going to ask you to imagine that, during the coming year, you and your fellow employees go out on strike. The strike is still on after 2 months have passed. Assume that the various sources of income available to you are food stamps, general public assistance or welfare, unemployment compensation, union strike funds. I would like you to rank these sources of income. Which would you be most likely to seek -- food stamps, general public assistance or welfare, unemployment compensation, union strike funds? And which source of income would you rank second? And third?"

Unemployment compensation - ranking

| UNION MEMBERS | Percentage of all respondents | Percentage of respondents who expressed opinion |
|---|---|---|
| First | 52.5 (±4.6) | 53.5 (±4.6) |
| Second | 32.5 (±4.2) | 33.1 (±4.4) |
| Third | 8.3 (±2.4) | 8.4 (±2.6) |
| Fourth | 4.8 (±2.2) | 4.9 (±2.2) |
| No opinion | 2.0 (±1.2) | - |



TABLE 7 ... PROJECTED RESPONSES OF UNION MEMBERS IN NEW YORK STATE TO THE QUESTION:

"I am going to ask you to imagine that, during the coming year, you and your fellow employees go out on strike. The strike is still on after 2 months have passed. Assume that the various sources of income available to you are food stamps, general public assistance or welfare, unemployment compensation, union strike funds. I would like you to rank these sources of income. Which would you be most likely to seek -- food stamps, general public assistance or welfare, unemployment compensation, union strike funds? And which source of income would you rank second? And third?"

Union strike funds - ranking

| UNION MEMBERS | Percentage of all respondents | Percentage of respondents who expressed opinion |
|---|---|---|
| First | 38.1 (±4.4) | 39.1 (±4.6) |
| Second | 37.2 (±4.4) | 38.2 (±4.4) |
| Third | 11.0 (±2.8) | 11.3 (±2.8) |
| Fourth | 11.1 (±2.6) | 11.4 (±2.6) |
| No opinion | 2.6 (±1.4) | - |

TABLE 8 ... PROJECTED RESPONSES OF UNION MEMBERS IN NEW YORK STATE TO THE QUESTION:

"I am going to ask you to think about a situation that might occur in labor-management relations. Suppose a union has asked for a 12 percent pay increase. The company has offered 6 percent. A vote is held on whether or not to strike. Union members are told that, if the strike continues for 8 weeks, they will be eligible for unemployment compensation. Do you think that the existence of unemployment compensation will substantially affect the vote on striking, affect the vote somewhat, or not affect the vote at all?"

[PLAINTIFFS' EXHIBIT 383]

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| UNION MEMBERS | Percentage of all respondents | Percentage of respondents who expressed opinion |
|---|---|---|
| Substantially | 19.6 (±3.6) | 20.8 (±3.8) |
| Somewhat | 47.3 (±4.4) | 50.0 (±4.6) |
| Not at all | 27.7 (±4.0) | 29.2 (±4.2) |
| No opinion | 5.4 (±2.0) | - |

TABLE 9 ... PROJECTED RESPONSES OF UNION MEMBERS IN NEW YORK STATE TO THE QUESTION:

"Now, suppose that the union has been on strike for 6 weeks. The union still wants 12 percent, and the employer is still offering 6 percent. There is now a 2-week wait for unemployment compensation. A vote is held on whether or not to continue the strike. Do you think the expectation of unemployment compensation in 2 weeks will substantially affect the vote on continuing to strike, affect the vote somewhat, or not affect the vote at all?"

[PLAINTIFFS' EXHIBIT 384]

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| UNION MEMBERS | Percentage of all respondents | Percentage of respondents who expressed opinion |
|---|---|---|
| Substantially | 29.8 (±4.2) | 31.0 (±4.2) |
| Somewhat | 45.6 (±4.4) | 47.4 (±4.6) |
| Not at all | 20.8 (±3.6) | 21.6 (±3.8) |
| No opinion | 3.7 (±1.6) | - |

TABLE 10 ... PROJECTED RESPONSES OF UNION MEMBERS IN NEW YORK STATE TO THE QUESTION:

"Now, suppose that the strike has lasted 8 weeks. The union's demand and company's offer are still at 12 percent and 6 percent. There is another vote on whether to continue to strike. Will the fact that union members are now eligible for unemployment compensation substantially affect the vote on continuing to strike, affect the vote somewhat, or not affect the vote at all?"

| UNION MEMBERS | Percentage of all respondents | Percentage of respondents who expressed opinion |
|---|---|---|
| Substantially | 43.4 (±4.4) | 45.3 (±4.6) |
| Somewhat | 36.9 (±4.4) | 38.5 (±4.4) |
| Not at all | 15.4 (±3.0) | 16.1 (±3.2) |
| No opinion | 4.3 (±1.8) | - |



TABLE 11 ... PROJECTED RESPONSES OF NONUNION AND UNION MEMBERS IN NEW YORK STATE TO THE QUESTION:

"May I have your opinion on this survey -- would you say that the questions were worded in such a way as to favor management, to favor unions, or to be equally fair to unions and management?"

| UNION MEMBERS | Percentage of all respondents | Percentage of respondents who expressed opinion |
|---|---|---|
| Favors management | 14.1 (±3.0) | 14.5 (±3.2) |
| Favors unions | 9.5 (±2.6) | 9.7 (±2.6) |
| Equally fair | 73.5 (±4.0) | 75.7 (±3.8) |
| No opinion | 2.9 (±1.4) | - |
| **NONUNION MEMBERS** | | |
| Favors management | 10.5 (±2.8) | 10.9 (±2.8) |
| Favors unions | 11.6 (±2.8) | 12.0 (±3.0) |
| Equally fair | 74.2 (±4.0) | 77.1 (±3.8) |
| No opinion | 3.8 (±1.6) | - |

[Plaintiffs' Exhibit 407]

TABLE 1

MEAN LENGTH OF STRIKES BY LOCATION FOR ALL STRIKES, STRIKES OF EIGHT WEEKS OR LESS AND MORE THAN EIGHT WEEKS

| | New York | Rhode Island | All Others |
|---|---|---|---|
| | (1) | (2) | (3) |
| **All Strikes** | | | |
| Mean Length (Weeks) | 3.5 | 3.7 | 3.6 |
| Standard Error (Weeks) | (0.09) | (0.27) | (0.02) |
| Number of Strikes | 4,556 | 350 | 50,972 |
| **Strikes of Eight Weeks or Less** | | | |
| Mean Length | 1.8 | 2.1 | 1.9 |
| Standard Error | (0.03) | (0.11) | (0.01) |
| Number of Strikes | 4,068 | 304 | 44,391 |
| Percent of All Strikes | 89.28 | 86.86 | 87.09 |
| **Strikes of More than Eight Weeks** | | | |
| Mean Length | 17.4 | 14.7 | 15.0 |
| Standard Error | (0.50) | (0.74) | (0.10) |
| Number of Strikes | 488 | 46 | 6,581 |
| Percent of All Strikes | 10.71 | 13.14 | 12.91 |

Source: U.S. Department of Labor, Bureau of Labor Statistics, Computer Tape of Analysis of Work Stoppages, 1965-74.



[Plaintiffs' Exhibit 408]

TABLE 2

MEAN LENGTH AND NUMBER OF STRIKES FOR STRIKES OF MORE THAN EIGHT WEEKS

| State | Mean Length (Weeks) | Standard Error (Weeks) | Number of Strikes |
|---|---|---|---|
| | (1) | (2) | (3) |
| New York | 17.389 | 0.50 | 488 |
| Rhode Island | 14.668 | 0.74 | 46 |
| **States With 100 or More Strikes** | | | |
| Pennsylvania | 14.371 | 0.29 | 704 |
| Ohio | 14.503 | 0.29 | 631 |
| California | 14.492 | 0.30 | 522 |
| Michigan | 15.406 | 0.42 | 413 |
| Illinois | 14.482 | 0.42 | 401 |
| New Jersey | 14.472 | 0.58 | 262 |
| Missouri | 15.062 | 0.53 | 253 |
| Indiana | 15.204 | 0.62 | 239 |
| Texas | 15.696 | 0.60 | 230 |
| Massachusetts | 14.342 | 0.55 | 207 |
| Wisconsin | 15.309 | 0.56 | 188 |
| Tennessee | 16.184 | 0.91 | 185 |
| Kentucky | 14.213 | 0.54 | 168 |
| Florida | 16.029 | 0.98 | 165 |
| Alabama | 14.984 | 0.56 | 157 |
| West Virginia | 15.897 | 0.64 | 139 |
| Washington | 15.002 | 0.66 | 125 |
| Iowa | 14.092 | 0.63 | 123 |
| Connecticut | 15.596 | 0.80 | 106 |
| Georgia | 14.599 | 0.61 | 102 |
| Maryland | 15.928 | 1.09 | 101 |
| **States With 50 to 100 Strikes** | | | |
| Minnesota | 13.473 | 0.74 | 96 |
| Virginia | 17.378 | 0.99 | 90 |
| Louisiana | 15.228 | 0.85 | 89 |
| Oregon | 14.614 | 0.89 | 88 |
| North Carolina | 16.882 | 0.89 | 70 |
| Arkansas | 16.710 | 1.05 | 66 |
| Oklahoma | 14.414 | 0.77 | 59 |
| Kansas | 13.962 | 0.89 | 56 |
| Colorado | 14.852 | 1.16 | 54 |
| **States With 50 Strikes or Less** | | | |
| Nebraska | 17.571 | 1.32 | 39 |
| Arizona | 13.722 | 0.96 | 38 |
| South Carolina | 16.673 | 1.31 | 38 |
| Mississippi | 13.911 | 1.05 | 37 |
| Delaware | 15.130 | 0.92 | 34 |
| Nevada | 16.781 | 1.50 | 32 |
| Montana | 14.038 | 1.07 | 30 |
| New Mexico | 16.576 | 1.76 | 28 |
| Maine | 14.370 | 1.15 | 27 |
| Utah | 15.164 | 1.87 | 27 |
| District of Columbia | 17.509 | 3.39 | 23 |
| Idaho | 17.633 | 2.12 | 23 |
| New Hampshire | 18.248 | 2.71 | 19 |
| North Dakota | 14.248 | 1.28 | 19 |
| Vermont | 19.611 | 1.87 | 18 |
| Alaska | 14.294 | 0.96 | 17 |
| Hawaii | 15.420 | 2.12 | 17 |
| South Dakota | 14.348 | 1.81 | 16 |
| Wyoming | 14.214 | 1.81 | 10 |

Source: U.S. Department of Labor, Bureau of Labor Statistics, Computer Tape of Analysis of Work Stoppages, 1965-74.

n/c/r/a

[Defendants' Exhibit 1]

**Defendants' Exhibit 1**

# Comparison of State Unemployment Insurance Laws

U.S. DEPARTMENT OF LABOR
J. D. Hodgson, Secretary

Manpower Administration
Unemployment Insurance Service

January 1972



*Defendants' Exhibit 1*

TABLE 405.—DISQUALIFICATION FOR UNEMPLOYMENT CAUSED BY LABOR DISPUTE

ELIGIBILITY

| State | Duration of disqualification | | | Disputes excluded if caused by-- | | | Individuals are excluded if neither they nor any of the same grade or class are-- | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | During stoppage of work due to dispute (29 States) | While dispute in active progress (12 States) | Other (11 States) | Employer's failure to conform to-- | | | Lockout (15 States) | Participating in dispute (42 States) | Financing dispute (30 States) | Directly interested in dispute (42 States) |
| | | | | Contract (4 States) | Labor law (4 States) | | | | | |
| (1) | (2) | (3) | (4) | (5) | (6) | | (7) | (8) | (9) | (10) |
| Ala. | | | | | | | | | | |
| Alaska | X | | | | | | | | | |
| Ariz. | | | | | | | | | | |
| Ark. | | | | | | | | | | |
| Calif. | | X | | | | | | | | |
| Colo. | | | | | | | | | | |
| Conn. | | | | | | | | | | |
| Del. | | | | | | | | | | |
| D.C. | X | | | | | | | | | |
| Fla. | | | | | | | | | | |
| Ga. | | | | | | | | | | |
| Hawaii | X | X | | | | | | | | |
| Idaho | | | | | | | | | | |
| Ill. | | | | | | | | | | |
| Ind. | X | | | | | | | | | |
| Iowa | | | | | | | | | | |
| Kans. | X | X | | | | | | | | |
| Ky. | | | | | | | | | | |
| La. | | | | | | | | | | |
| Maine | X | | | | | | | | | |
| Md. | | | | | | | | | | |
| Mass. | X | X | | | | | | | | |
| Mich. | | | | | | | | | | |
| Minn. | | | | | | | | | | |
| Miss. | X | | | | | | | | | |

(Table continued on next page)

TABLE 405.—DISQUALIFICATION FOR UNEMPLOYMENT CAUSED BY LABOR DISPUTE (CONTINUED)

| State | Duration of disqualification | | | Disputes excluded if caused by-- | | | Individuals are excluded if neither they nor any of the same grade or class are-- | | |
|---|---|---|---|---|---|---|---|---|---|
| | During stoppage of work due to dispute (29 States) | While dispute in active progress (12 States) | Other (11 States) | Employer's failure to conform to-- Contract (4 States) | Employer's failure to conform to-- Labor law (4 States) | Lock-out (15 States) | Participating in dispute (42 States) | Financing dispute (30 States) | Directly interested in dispute (42 States) |
| (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) | (9) | (10) |
| Mo. | X 2/ | | | | | | X | X | X |
| Mont. | X | | | | X | | X | X | X |
| Nebr. | X | | | | | | X | X | X |
| Nev. | | X | | | | | X | X | X |
| N.H. | X 2/ 5/ | | | X | | X | X | X | X |
| N.J. | X | | | | | | X | X | X |
| N.Mex. | X | | | | | | X | | X |
| N.Y. | | | X 6/ | | | | | | |
| N.C. | | | X 2/ | | | | | | |
| N.Dak. | X | | | | | | X | | X |
| Ohio | | | X 1/ 10/ | | | X | | | |
| Okla. | X | | | | | | X | | X |
| Oreg. | | X | | | | | X | X | X |
| Pa. | X | | | | | X | X | | X |
| P.R. | X | | | | | | X | | X |
| R.I. | | | X 6/ | | | | X 4/ | X 4/ | X 4/ |
| S.C. | | X | | | | | X | X 4/ | X |
| S.Dak. | X | | | | | | X | X | X |
| Tenn. | | X | | | | | X | | |
| Tex. | X 7/ | | | | | | X 7/ | X 7/ | X 7/ |
| Utah | X 5/ 10/ | | | | X | X 3/ | | | (8) |
| Vt. | X | | | | | | X 4/ | X 4/ | X 4/ |
| Va. | | | X 2/ | | | | X | X | X |
| Wash. | X | | | | | | X | X | X |
| W.Va. | X 11/ | | | X 3/ | | X | X | X | X |
| Wis. | | X | | | | | | | |
| Wyo. | X | | | | | | X | X | X |

(Footnotes on next page)





(Footnotes for Table 405)

1/ So long as unemployment is caused by existence of labor dispute.

2/ See text for details.

3/ By judicial construction of statutory language.

4/ Applies only to individual, not to others of same grade or class.

5/ Disqualification is not applicable if claimant subsequently obtains covered employment and: earns 8 x his wba or has been employed 5 full weeks (Maine); earns at least $900 (Mass.); works at least 5 consec. weeks in each of which he earned 120% of his wba (N.H.); earns $700 with at least $20 in each of 19 different calendar weeks (Utah). However, BPW earned from ER involved in the labor dispute cannot be used to pay benefits during such labor dispute (Mass. and Utah).

6/ Fixed period: 7 consec. weeks and the waiting period or until termination of dispute (N.Y.); 6 weeks and waiting period (R.I.). See Table 303 for waiting period requirements.

7/ So long as unemployment is caused by claimant's stoppage of work which exists because of labor dispute. Failure or refusal to cross picket line or to accept and perform his available and customary work in the establishment constitutes participation and interest.

8/ Disqualification is not applicable if employees are required to accept wages, hours, or other conditions substantially less favorable than those prevailing in the locality or are denied the right of collective bargaining.

9/ Disqualification not applicable to any claimant who failed to apply for or accept recall to work with an ER during a labor dispute work stoppage if claimant's last separation from ER occurred prior to work stoppage and was permanent.

10/ Applicable only to establishments functionally integrated with the establishments where the lockout occurs (Mich.). Employee not ineligible: unless the lockout results from demands of employees as distinguished from an ER effort to deprive the employees of some advantage they already possess (Colo.); if individual was laid off and not recalled prior to the dispute, if he was separated prior to the dispute, if he obtained a bona fide job with another ER while dispute was in progress (Ohio); if the ER was involved in fomenting the strike (Utah).

11/ Disqualification ceases: when operations have been resumed but individual has not been reemployed (Ga.); within 1 week following termination of dispute if individual is not recalled to work (Mass.). If the stoppage of work continues longer than 4 weeks after the termination of the labor dispute, there is a rebuttable presumption that the stoppage is not due to the labor dispute and the burden is on the ER to show otherwise (W.Va.).

[Defendants' Exhibit 11; Transcript of 1971 Recorded Telephone Message; New York City]

This is CWA, Local 1101. Wednesday, November 3rd. 6:50 p.m. John Keefe, secretary reporting.

Bargaining was delayed today at the company's request. The union presented its demand number 11 which covers forced overtime. The union demanded eight hour limitation on the number of hours a member could be forced to work overtime. This would be a year-round application. There would be no forced overtime on a union meeting night. And there would be a minimum of four hours notice before any forced overtime assignment.

The company rejected all of the demands and accused the union of encroaching on a management prerogative—the right to assign overtime. They said their proposal on forced overtime, as contained in the rejected July 18th offer, was a give on their part. The company agreed that the rejected July 18th offer did include the stipulation that the nine hour application to qualify for the double time application would apply to all tours whether 40, 37½ or 35 hours.

Bargaining is set to resume tomorrow, Thursday.

Keep in touch with this tape for further information.

Thank you for calling.



[Defendants' Exhibit 23; Transcript of 1971 Recorded Telephone Message; Westchester County]

July 26th. 6 p.m. This is Dan Keenan.

So far in the downstate area membership meetings have been held here in Westchester and also in 1104-Nassau, in 1108-Suffolk, in 1102-Staten Island and today in Local 1106-Queens.

I am happy to be able to report to you from first hand observation that the unanimity expressed at our meeting in Westchester has been expressed just as strongly by our brothers and sisters downstate. It has been reported to me that approximately 80,000 men and women across the country are still on strike.

The New York State presidents have requested me, as chairman of their plant coordinating council, to formally request the Attorney General of the State of New York to investigate the possibility of collusion between CWA and the New York Telephone Company to keep us away from the bargaining table.

I am also complying with the request of many of the local presidents to coordinate the locals in making a request for a special convention of CWA on the following situation.

Things have not changed. No negotiations are in progress even though, as of this date, New York plant is still on contract.

This single most important thing that you, the membership of Local 1103, can do for yourself and for your futures is to remain steadfast in your complete rejection of this complete farce and failure called a contract. I repeat . . . Nothing is changed. We are still on strike. We are still fighting for enonomic justice for the telephone worker.

This is CWA, Local 1103, AFL-CIO, Scarsdale, New York.

Thank you for calling.

[DEFENDANTS' EXHIBIT 27; Transcript of 1971 Recorded Telephone Message; Queens County]

Local 1106, CWA, Queens County, New York. Tuesday, December 28th. This is Frank McQuail.

In Stamford, Connecticut today Local 1106 members, in a joint action with other downstate locals, picketed Southern New England Bell off the job in retaliation against the importation of management scabs being brought into New York. Members of the independent union honored our lines without question. Apparently they despise the actions of these scabs as much as we do.

It's ironic to note two completely different stories recently. One which is an outline of the Public Service Commission report which indicates that service by the phone company continues to improve despite the strike. The second reports the telephone company as being one of the largest contributors to the Governor's transportation bond issue campaign, something they should have little or no interest in. And that seems to tell it all.

Thank you for calling.

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[DEFENDANTS' EXHIBIT 28; Transcript of 1971 Recorded Telephone Message; Queens County]

Local 1106, CWA. Saturday, December 4th. 3 p.m.

The union and company bargaining teams met in joint session. Discussion centered around wages and the cost of living in metropolitan New York. We cannot base our salaries on a nationwide index. We have had the highest



*Defendants' Exhibit 32*

cost of living in the continental United States for the last 54 months. If we accepted the national average the cost of living in New York would have to go up $30 in order for us to get the $12 projected figure.

Wednesday's Daily News and Times stated that not alone is the company discriminating against the union, but more so against blacks, Puerto Ricans and females. This is the opinion of the federal Economic Opportunity Commission. Archie Bunker is alive and well and managing the Bell System.

We would like to stress that we have entered into highly intensive bargaining. Negotiations will continue.

This is Bill Ryan.

Thank you for calling.

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[DEFENDANTS' EXHIBIT 32; Transcript of 1971 Recorded Telephone Message; Queens County]

Sunday, September 5th. 2:00 p.m.

These are very difficult times for all our members and we realize this. Your leaders in their desire to get you a just wage increase and decent working conditions have been faced with the problems of combating not only the company but the International Union, a wage freeze, and in some cases, distortion in the news and the press. It would be impossible to respond to the daily half-truths and lies that you are being subjected to.

Very basically it is the position of the local's leadership in New York State that the wage increases and cost-of-

*Defendants' Exhibit 33*

living increases should be based on cost-of-living in New York State and should not be the same as the rest of the company. And the contract language, which has made the telephone job one of the most insecure, abusive jobs in the community, must be change, and this includes the "N" day.

We believe that members are fed up with the Mickey Mouse operations of the telephone company and its powerless Industrial Relations department which likes to provoke rather than resolve problems. All our demands have been presented to the company and the company has requested a recess until Tuesday to study them.

Our local held a local meeting Wednesday at which over a thousand members and the press were present followed by a complete question and answer period. The meeting terminated with a standing, overwhelming show of support.

Our strike is as strong or stronger than it's ever been.

This is Ed Creegan for Local 1106, CWA, Queens, New York.

Thank you for calling.

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[DEFENDANTS' EXHIBIT 33; Transcript of 1971 Recorded Telephone Message; Queens County]

Tuesday, August 17th. 7 p.m.

There will be a meeting of all the New York plant local presidents tomorrow.

We should have information on what effect the wage freeze will have on our bargaining. The rumors are plentiful but none of them are based on fact because the facts are



*Defendants' Exhibit 34*

not yet known. There is no reason to believe that we cannot negotiate a good contract, including wages within the limitations of any restrictions voiced by the government.

You are the most militant union members in the CWA or any other union. This is a difficult period but a strike is not supposed to be easy. If we stick together and don't lose faith we will win out.

This is Ed Creegan for Local 1106, CWA, Queens, New York.

Thank you for calling.

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[DEFENDANTS' EXHIBIT 34; Transcript of August 9, 1971, Recorded Telephone Message; Queens County]

Local 1106, CWA, Queens County, New York. This is Frank McQuail.

You've all received letters from Ellinghaus and Moses and phone calls from your foremen. You've also received letters from Joe Beirne and Morton Bahr giving you enough reading material to last at least half a lifetime. When it comes down to the nitty-gritty it is you individually who will determine the acceptability of this contract. Their comparisons to the course of multitude of letters which are placed in our wages would probably have satisfied our original demands.

But the present Madison Avenue approach of president Beirne giving one minute commercials on radio to sell a contract like it was a bar of soap is ridiculous. If half the effort expended in this direction had been used to influence

the company prior to our strike, we would not now be on strike. Instead we are inundated through every available media with the sale of a contract, rather than to let the contract stand solely on its own merit. A good contract would not necessitate all the promotional high pressuring that we are being subjected to.

If you have not used your ballot, do so immediately. Let the Bell System know our dissatisfaction and let the International know that we truly do understand what this so-called package means to us in New York. There is one glaring fact, using the formula which gives New York only $4 over the original pattern in the first year. The average of the consumer price index, which will have New York undoubtedly at the high end, we will lose at least one to two per cent in each of the second and third years just through this one item. Think for yourselves, vote this contract down or be prepared to live with it.

Thank you for calling.

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[Defendants' Exhibit 35; Transcript of 1971 Recorded Telephone Message; Queens County]

Thursday, August 5th. 6 p.m.

Anyone who has not received a ballot must call 275-5900 by 12 Noon tomorrow, Friday, August 6th.

There will be a rally at 12 Noon, Tuesday in front of 195 Broadway. All members are urged to attend.

Those of you who have not yet mailed in your ballot, I urge you to do so and vote "no."



I know you have been bombarded with material telling you what a good offer the company is making. I can only tell you this. If you vote "yes" you've been had and the company will make you eat this contract page by page. The contract language is the same as they used to harrass and abuse you for years. There is no change in "N" days, forced overtime and transfer procedure. Aside from the little or no increase in benefits.

One final point I take strong exception to the personal attacks on our local president, John Renck by the telephone company and Morty Bahr, the CWA vice president, who is located at 85 Worth Street. If it's politics for John Renck to state that either Joe Beirne insisted in getting a fair contract or we intend to ship him out, then in my opinion this is the way politics should work. John would be gutless and irresponsible if he did not tell CWA and Beirne when they were wrong. I feel that every member who agrees with me should drop Bahr a note with a copy to this office and a second copy to Joe Beirne at 1925 Cane Street, Northwest, Washington, D.C., 20006.

Our membership has destroyed every myth about telephone people being lousy union men and women. Your attitude and support since this strike began could not be better.

This is Ed Creegan for Local 1106, CWA, 8948 Metropolitan Avenue, Rego Park, New York.

Thank you for calling.

[Defendants' Exhibit 36; Transcript of August 5, 1971, Recorded Telephone Message; Queens County]

The following letter was sent to District Vice President Bahr in response to his letter of July 27th:

"Your reference to a statement in the second paragraph alleging I had made certain statements at the Queens membership meeting on July 26th in connection with the New York State Attorney General's office are inaccurate and misleading.

You also make reference to your insistence I personally made charges against the union immediately before the Attorney General. If charges are filed. I feel would be my obligation to present all the facts and all the circumstances surrounding the bargaining of the New York plant contract if requested to do so. However, I am also aware that under certain provisions which in the union's constitution what you are insisting I do would immediately lead to automatic revocation or suspension of the charter of my local. I have no intention of falling into this trap.

If I am called upon to testify, I would request full immunity be granted to myself in writing by the executive board of the union or any other member also requested to do so. I contend further that the five other elected members of the union's bargaining committee agree with my position —I or any other member of the elected bargaining team did not sign or in any other manner accept the New York Telephone's last offer for submission to the rank-and-file of the New York plant bargaining unit. We never had a proper opportunity to negotiate the plant contract and that is the reason we are unanimously urging its rejection.



*Defendants' Exhibit 37*

"In closing I would like to point out something you had failed to mention in your letter. The fact that all of the New York plant local presidents at a meeting in the Manhattan Hotel on Sunday, July 18th after unanimously rejecting the New York Telephone Company's so-called last offer, was promised it would not be submitted to a ratification vote. That promise was not kept.

Sincerely,

John Ronck,
the president of Local 1106, CWA"

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[Defendants' Exhibit 37; Transcript of 1971 Recorded Telephone Message; Queens County]

Monday, August 2nd.

I have just been informed that the ballots on the so-called contract are being received by our members. Although your local representatives were not exactly sure when you would receive your ballots, apparently the president of the telephone company was sure because in that same mail there is a letter from Ellinghaus recommending that you accept the contract.

If you follow his advice and vote "yes" I can guarantee you that his company policies harassing you with forced overtime, absence control, ignoring seniority in temporary and permanent transfers, and all the other problems involved with the contract language that we were denied the right to negotiate will continue.

Your bargaining committee and every local president in the State of New York, also your local executive board, all three groups urge unanimously that you vote "no." This is the only way our bargaining committee can go back in and negotiate a decent contract.

All stewards are instructed to contact your constituents and urge them to reject this offer. This is your chance to show the telephone company and the CWA that we in New York are fed up with lousy contracts and lousy working conditions. Help us to fight for you. Reject this contract; vote "no."

This is Ed Creegan for Local 1106, CWA, Queens, New York.

Thank you for calling.

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[DEFENDANTS' EXHIBIT 38; Transcript of 1971 Recorded Telephone Message; Queens County]

This is John Renck, president of Local 1106, CWA. 8:00 p.m. Thursday evening, July 29th.

Today I had the pleasure to address 5,000 members of Local 1101, CWA in Manhattan Center along with seven other downstate local presidents. I made a statement at that meeting charging anyone who states that I, or any other member of the six man elected local bargaining team, signed or in any matter accepted for submission to the rank and file of the New York plant bargaining unit the so-called last offer of the New York Telephone Company management is a liar.





At the present time district vice president Bahr, along with various vice presidents of the New York Telephone Company, have already sent letters to all members in New York State and the company to all employees in New York State making this allegation.

I do not have the resources to duplicate their propaganda efforts to mislead you. For the record the charge of collusion between CWA and the New York Telephone Company was made by Dan Keenan, president of Local 1103 and chairman of the New York plant coordinating council, an affiliation of 23 plant locals in New York State. I support this charge and as a member of the bargaining team state that collective bargaining for the New York plant contract does not take place across the bargaining table by your elected committee.

A formal filing of charges will be accomplished when our attorneys have completed their briefs. I guarantee you this will be done. I have stated many times that when our International Union is unjustly charged, I will defend them and you have heard me state this many times. However, I feel that the rank and file of the New York plant bargaining unit does not have an opportunity to have our elected bargaining team negotiate our own contract.

I will not stand silent on this issue and because of this allegations have been made against me by the CWA and the management of New York Tel. To have been silent would have been cowardly and not in the best interests of the 32,000 members of New York plant.

This is Local 1106, CWA, AFL-CIO, Queens County, New York.

Thank you for calling.

[Defendants' Exhibit 39; Transcript of 1971 Recorded Telephone Message; Queens County]

July 27th. 4 p.m.

This office has been informed that the telephone company management are calling on members at home and asking them what they are looking for in order to return to work. All members should inform the company that you have a union bargaining committee and if they're ever going to ever bargain in good faith they will contact our rank and file members of the bargaining committee of which John Renck, our local president, is a member.

Let me make one point very clear. The company's present offer has no change in the contract language and they're right to assign overtime whenever they feel like it, except for a 13 hour limitation where they worked 15 hours before. Also, there is no change in "N" day language. No change in the language to recognize seniority on permanent and temporary transits within the local. Not only do we not get a change in contract language and many craft breakouts, but did not even get an opportunity to present our case to the company.

It's a take-it-or-leave-it offer. We are sick and tired of take-it-or-leave-it attitudes from the company and we are tired of Joe Beirne telling us what is good for us.

The company's operating management from Moses to vice president of Long Island to Ellinghaus, the president of the company, have continually maintained this snobbish attitude toward the union and this is why we could never and may never have good labor relations with the New York Telephone Company.

Most of our members are eligible for supplementary re-



*Defendants' Exhibit 77*

lief. Please contact or stop by the local office. We also have some jobs available.

If you continue to display the unity and guts to follow our leadership, we have the ability and guts to lead you.

This is Ed Creegan who is proud to be the vice president of Local 1106, 89-48 Metropolitan Avenue, Queens, New York.

Thank you for calling.

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[Defendants' Exhibit 40; Transcript of 1971 Recorded Telephone Message]

July 26th. 7:30 p.m.

At a meeting held at Antun's this morning, 1,500 members voted unanimously to uphold the position of the local presidents and executive board of this local to maintain the strike against the New York Telephone Company.

There was complete television and radio coverage of this meeting. We will remain on strike until such time as we can negotiate our own contract.

This is Bill Ryan, Local 1106, CWA.

Thank you for calling.

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[Defendants' Exhibit 77]

[1] STATEMENT OF
NEW YORK TELEPHONE COMPANY

Preliminary Statement

This statement is submitted in accordance with Form PB-1, Part V(c) in support of a request for approval to

place into effect the wages contained in a Collective Bargaining Agreement between the New York Telephone Company and the Communications Workers of America, AFL-CIO, dated February 17, 1972, covering approximately 38,000 Plant bargaining unit employees throughout the State of New York. The wages are to be effective as of February 13, 1972. This agreement is the last of about 125 agreements reached during the current round of Bell System collective bargaining. It is the last agreement signed between the New York Telephone Company and the Unions representing its employees.

FACTS

The Bell System's 700,000 Union represented employees are divided into 125 collective bargaining units. They perform functions similar to those units in the New York Company, which is divided into seven bargaining units as follows: Upstate Commercial, Downstate Commercial, Upstate Accounting, Downstate Accounting, Upstate Traffic, Downstate Traffic, Plant Department-statewide. The [2] Plant Department employees are represented by the Communications Workers of America, AFL-CIO, an international union and the other bargaining units are represented by independent unions. The Company employs over 100,000 people, 78,000 of whom are represented by unions for collective bargaining purposes.

Early in the spring of 1971, collective bargaining negotiations commenced between Bell System Companies and the unions representing Bell System employees. On July 18, 1971 an agreement on the basic Bell System pattern was reached between the CWA and Bell System Com-



panies, including the New York Telephone Company. As a result of that national pattern agreement, 89 bargaining units represented by the CWA and other unions, containing 530,000 employees, including 3,000 employees in the New York Telephone Company's Upstate Commercial and Accounting units, obtained new Collective Bargaining Agreements, which were negotiated, ratified and became effective on different dates prior to the President's Freeze Order #11615. The agreements covering CWA represented units were ratified by the CWA members in separate elections in the different bargaining units throughout the country on August 14, 1971. However, the Plant employees of the New York Company failed to ratify the pattern agreement and voted instead to continue its strike, which lasted for a total of seven months.

Eleven other contracts covering approximately 44,000 employees in the Bell System, including the two contracts [3] for the 12,000 Downstate Commercial and Downstate Accounting employees in the New York Company, were also negotiated prior to the President's Freeze Order. These agreements were ratified on differen dates subsequent to August 15, 1971; the new rates were nevertheless permitted to go into effect retroactively to a date prior to the wage freeze.

Several additional agreements were signed and ratified between August 15 and November 14. Though some of these agreements provided for retroactive wage increases to dates prior to the freeze, they were allowed, under the Pay Board's rules, to become effective as of November 14, 1971. Included in this group is the agreement covering

the New York Company's 19,000 Downstate Traffic employees. On November 10, 1971 the Office of Emergency Preparedness permitted the New England Telephone and Telegraph Company to put into effect its wage increases retroactive to dates prior to August 15, 1971 for three of its bargaining units consisting of a total of 28,000 employees. The Office of Emergency Preparedness also permitted the Illinois Bell Telephone Company to put into effect similar percentage wage increases retroactive to June 27, 1971 for 14,000 of its Plant employees. In addition, the 5,700 Upstate Traffic employees of the New York Telephone Company were permitted by the Office of Emergency Preparedness to put into effect their wage increases retroactive to June 6, 1971 on the grounds that they were [4] linked to the Company's Upstate Commercial Agreement of July 19, 1971, which also had wage increases effective as of June 6, 1971.

All of the foregoing agreements that were signed and ratified during the freeze covered a total of 85,000 Bell System employees.

In addition, in the first week of August, 1971 approximately 20,000 supervisors of the New York Telephone Company and several thousand supervisors of other Bell System Companies received wage increases based on a similar national pattern. The Company's Plant employees are the only remaining group who have not received wage increases based on the national pattern.

Collective bargaining between the New York Telephone Company and the CWA continued during the strike which lasted for seven months. Agreement was finally reached through the intervention of the Federal Mediation and



Conciliation Service, with J. Curtis Counts personally conducting the mediation.

In order to reach agreement and settle the strike some additional items, both economic and non-economic, were added to the July 18, 1971 pattern, which was originally rejected by the CWA membership in the New York bargaining unit. (That pattern was actually embodied in a stipulation dated July 27, 1971, signed by the New York Telephone Company and the CWA.) The additional economic items recommended by the Mediator were:

[5] a) A Saturday premium of 10% effective on agreement and an additional 5% on the first Contract anniversary. This adds only .17% of total annual labor costs to the July 18, 1971 pattern at the Contract effective date. (An additional .08% is deferred to the anniversary date.)

b) Basic wages at the top step of the five year progression schedules were increased $1.00 in the highest and lowest wage zones and $1.50 in the other zones. This adds only .26% of total annual labor costs to the July 18, 1971 pattern.

These slight additions to the July 18, 1971 pattern are insignificant, especially when one considers that their percentages are significantly reduced for the first year of the Contract because of the seven month strike.

• • • • •

*Defendants' Exhibit 77*

[12] CONCLUSION

As was indicated, the wage increases for the Company's Plant employees is merely the last stage of a long series of increases that were granted to all bargaining units in the Bell System. Had the Plant employees ratified the agreement reached at the same time as other CWA units ratified theirs on August 14, 1971, this application to the Board would not be necessary.

Moreover, when compared to the other 700,000 Bell System union employees and the thousands of supervisory employees who received increases based on the same national pattern, the 38,000 Plant employees appear to be an insignificant number. Permitting them to receive wage increases with only a slight departure from the Bell System [13] pattern could not possibly create the inflationary upsurge that the President's economic controls are designed to restrain.

It is respectfully urged that prompt consideration be given this application and that approval be granted to place into effect the initial wage items of this contract as of February 13, 1972.

Respectfully submitted,

NEW YORK TELEPHONE COMPANY

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO

Dated: February 23, 1972



[DEFENDANTS' EXHIBIT 86; Transcript of 1974 Recorded Telephone Message; Rochester]

Wednesday, December 24, 1974—Christmas Eve

On behalf of all the officers and the executive board members of Local 1170, we would like to say Merry Christmas to the members and their families. It is with a heavy heart that Christmas 1974 finds us on strike. Business this year makes us understand how close we are to one another. In deed the injury of one is the hurt of all. The management of the Company on behalf of 1500 members, your employees, the members that I humbly represent, we wish you and your families a Merry Christmas and hope that our differences can be resolved as quickly as possible. The Telephone Company should and has been a family. Let us both work to bring that family back together again.

This is Local 1170, C.W.A. saying Good Night To All, and To All a Good Night.

Merry Christmas.

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[DEFENDANTS' EXHIBIT 89; Transcript of 1975 Recorded Telephone Message; Rochester]

C.W.A. TAPE RELEASE Wednesday, February 5, 1975

The Public Service Commission yesterday did not act on the Company's temporary rate increase and the case has been postponed another two weeks until February 18, 1975. The State AFL-CIO, through its President Ray Corbett has demanded that the Public Service Commission rebate all the telephone subscribers of the Telephone Company the money they have saved in wages since November

22, 1974 and as long as the strike lasts. Local 1170, C.W.A. will be passing out petitions supporting this position and demanding that the Company refund the money to the public at once. President Bahr will be at the Rochester Flagship tomorrow for a special press conference at 11:00 A.M. for a very important announcement concerning the strike.

This is Local 1170, C.W.A. thanking you for calling the tape, the place where we are still telling the truth.

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[DEFENDANTS' EXHIBIT 90; Transcript of 1975 Recorded Telephone Message; Rochester]

Thursday, February 6, 1975

Vice President Bahr of the Communications Workers of America today called for the head of the State Mediation Service, Mr. McDonald to appoint a fact finding hearing before the public or a three member panel, one appointed by the President of the State AFL-CIO, one appointed by the Rochester Chamber of Commerce and one by the Chairman McDonald, with the report of the three member panel made public. The Company's answer was that bargaining should be done at the local level. Vice President Bahr's opinion is that there was no progress in today's meeting between Vice President Bahr and Vice President Tom Riley. The Company's position remains the same, that is, the Union must concede 100% to the Company's demands—work rules, temporary transfers, Union leaves, and lay off procedures before the Company will bargain on any other issues. This Union after 77 days on strike will not capitulate.



This is Local 1170, C.W.A. thanking you for calling the tape, the place where we are still telling the truth.

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[DEFENDANTS' EXHIBIT 96; Transcript of 1975 Recorded Telephone Message; Rochester]

Thursday, March 27, 1975

The Public Service Commission in refusing Rochester Telephone's request for a temporary rate increase lists as one of its reasons—that the strike in an effect has improved the Company's net cash flow in earnings. Also the Commission will unquestionably want to take all the long term consideration in this account deciding on the proper level of a permanent relief for this Company. The Union has been informed that the Company is paying $620.00 per week for the scabs that they hired from Phoenix, Arizona plus an overtime rate of $16.80 per hour. This is just not fair or just even when we are working the Company does not pay us that plus if business is going so good for the Company with management doing our work, why do they need strangers from Arizona. Bad news.

This is Local 1170, C.W.A. thanking you for calling the tape, the place where we are still telling the truth.

[Defendants' Exhibit 97; Transcript of 1975 Recorded Telephone Message; Rochester]

C.W.A. Tape Release Thursday, April 10, 1975

Morton Bahr, Vice President of the Communication Workers of America today announced that the Union was soliciting massive support from the New York Congressional Delegation and State Legislatures and the public in general in its continuing effort to settle the nineteen week strike of the 1500 members of the Rochester Telephone Company. Mr. Bahr stated a repeated effort at the bargaining table has failed. The State Mediation Board has declared an impasse and has recessed negotiations subject to call. He pointed out that the Company President Beinetti has repeatedly refused to meet with the C.W.A. President Watts or anyone else and has chosen to leave the negotiations of the strike to a subordinate who has never negotiated a contract or has any previous experience. Bahr said in an offer made to the Company last week to request Mediation Chairman McDonnell to offer a non-binding proposal for settlement in the non-public atmosphere was not acceptable by management. The C.W.A. Vice President has called on the Public Service Commission to reject the Company's request for a permanent rate increase as long as the strike continues.

This is Local 1170, C.W.A. thanking you for calling the tape, the place where we are still telling the truth.



[Defendants' Exhibit 99; Transcript of 1975 Recorded Telephone Message; Rochester]

Friday, May 9, 1975

The charges that the Company has brought against Mr. Everett Warren a lineman, who was dismissed for alleged violations of the picket line has been thrown out of court by the justice of the peace in Henrietta. Now, how can the Company justify Mr. Everett Warren's dismissal. A petition requesting the Public Service Commission to refund to telephone subscribers will be mailed to all members. We must have 100% cooperation. Remember that the Company has saved almost seven million dollars during the strike with the subscribers still paying the full telephone bill.

This is Local 1170, C.W.A. thanking you for calling the tape, the place where you still hear the full truth.

[Defendants' Exhibit 100]

UNITED STATES DISTRICT COURT
Southern District of New York

73 Civ. 4557
(Owen, J.)

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New York Telephone Company, Western Electric Company, American Telephone & Telegraph Company, Long Lines Department, and Empire City Subway Company (Limited),

*Plaintiffs,*

—against—

New York State Department of Labor, Louis L. Levine, Industrial Commissioner of the New York State Department of Labor, New York State Department of Taxation & Finance, and Mario A. Procaccino, State Commissioner of Taxation & Finance,

*Defendants.*

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Answers and Objections to Defendants' First Interrogatories

To: Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for all Defendants
By: Maria Marcus
Assistant Attorney General
Two World Trade Center
New York, New York 10047



*Defendants' Exhibit 100*

Plaintiffs give the answers set forth below to the interrogatories served by defendants on March 28, 1975.

• • • • •

[9] *Interrogatory 9(a):* What was the average number of plaintiffs' employees, listed separately as to each plaintiff, who were scheduled to work but on strike during the period between July 21, 1971 and February 18, 1972?

[10] *Answers to Interrogatory 9(a):*[1][2]

| *Month* | *TELCO* | *Empire*[3] | *AT&T*[4] |
|---|---|---|---|
| July 1971 | 31,084 | | 3237 |
| August | 29,056 | 197 | 2247 |
| September | 29,943 | 125 | 498 |
| October | 30,462 | 113 | 326 |
| November | 30,289 | 94 | |
| December | 30,167 | 85 | |
| January 1972 | 30,267 | 83 | |
| February | 30,069 | 80 | |

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(1) With respect to this and the remaining interrogatories, an extensive search of the records of each of the plaintiffs, reaching back through 1970, and consuming, we estimate, hundreds of man-hours, has been conducted in an effort to locate, obtain and compile the information requested by these complex and extensive interrogatories. Wherever the information sought either did not exist or existed in a different form, plaintiffs have supplied the most responsive existing information. Despite these efforts, Western Electric Company has been unable to complete its answers to interrogatories 9 through 12. Rather than delay the service of the answers contained herein, the information concerning Western Electric Company will be supplied, as soon as it is received, in a supplement to these answers. For the purposes of the answers to interrogatories 9 through 12, the other plaintiffs shall be referred to in the following manner: New York Telephone Company ("TELCO"), Empire City Subway Company (Limited) ("Em-

*Defendants' Exhibit 100*

[11] *Interrogatory 9(b):* What are the estimated salaries, wages, overtime payments, fringe benefits, including vacation pay and pension and medical plan contributions, which would have been paid during this period to the employees specified in (a) if they had not been absent, listed separately on a monthly basis as to each plaintiff? Describe the documents from which each of these estimates is derived.

*Answers to Interrogatory 9(b):*[1]

| *Month* | *TELCO*[2] | *Empire*[3] | *AT&T*[4] |
|---|---|---|---|
| July 1971 | $24,544,720.07 | | $ 764,500 |
| August | 23,943,082.22 | 108,000 | 1,657,960 |
| September | 24,767,690.02 | 69,000 | 344,100 |
| October | 25,264,711.02 | 62,000 | 63,210 |
| November | 25,165,494.49 | 52,000 | |
| December | 25,064,131.37 | 47,000 | |
| January 1972 | 25,147,215.88 | 46,000 | |
| February | 24,982,708.37 | 44,000 | |

pire"), and American Telephone & Telegraph Company, Long Lines Department ("AT&T").

(2) These estimated averages exclude weekends and holidays.

(3) Empire's figures were compiled for the following periods: July 21-August 21, 1971; August 22-September 25, 1971; September 26-October 23, 1971; October 24-November 20, 1971; November 21-December 18, 1971; December 19, 1971-January 22, 1972; and January 23-February 18, 1972. The figures in this column appear next to the month covering the major part of each of these periods.

(4) AT&T's data are available only through October 8, 1971, and cover only its New York State employees.

(1) See footnote (1) to answers to interrogatory 9(a).

(2) Using data that reflects the number of union-represented employees and earnings per week, including vacation and over-



*Defendants' Exhibit 100*

[12] *Interrogatory 9(c):* What were the salaries, wages, overtime payments and fringe benefits, including vacation pay and pension and medical plan contributions, which were paid to the employees listed in (a), or those who ful-

time pay, for the week that includes the 15th of the month, an average weekly salary was computed using April, May and June 1971 for all employees in Plant, Traffic, Accounting and Commercial Departments. This average weekly salary was then multiplied by the average number of employees on strike and by 4.3 to equal an average month. Fringe benefits, pensions and medical plan contributions have been excluded because the data requested do not exist and, in any event, these payments were not discontinued during the strike. The TELCO data and computations used to prepare this answer are in the possession of Accounting Dept., General Financial Analyst, New York Telephone Company, 1095 Avenue of the Americas, New York, New York.

(3) All estimates were computed on the basis of various payroll records which show the employees' basic salaries, including vacation pay. The overtime payments included herein were computed using similar time periods in the previous year for the same number of employees and applying those factors to current basic wages. All figures are based on a 4.3 week month. Fringe benefits, pensions and medical plan contributions are treated as in footnote (2) for TELCO. The periods covered here are those listed in footnote (3) for Empire to answers to interrogatory 9(a). These records are in the possession of Angelo Tomeo, Financial Staff Manager, Empire City Subway Company (Limited), 140 West Street, New York, New York.

(4) All estimates were computed from summaries of computer printouts generated from payroll records based upon actual time reports for each employee in New York State. Such data are available only through October 8, 1971. This data recorded the total number of days lost, which was then multiplied by an estimated average wage rate of $30.00 per day per employee, including employee vacation pay. Fringe benefits, pensions and medical plan contributions are treated as in footnote (2) for TELCO. The summaries of computer printouts are in the possession of Al Filshie, Personnel Staff Supervisor, AT&T, Long Lines Department, 200 Park Avenue, New York, New York, for New York City, and of Robert Sullivan, Staff Supervisor, AT&T, Long Lines Department, 400 Hamilton Avenue, White Plains, New York, for upstate New York.

filled the same functions as such employees, during the periods between January 1, 1970 and July 1, 1971 and between March 1, 1972 and March 1, 1973, listed on a monthly basis and listed separately as to each plaintiff? Describe the documents from which each of these figures is derived.

[13] *Answers to Interrogatory 9(c):*[1]

| *Month* | *TELCO*[2] | *Empire*[3] |
|---|---|---|
| January 1970 | $24,786,120 | $110,000 |
| February | 27,358,386 | 98,000 |
| March | 24,278,306 | 84,000 |
| April | 24,493,251 | 93,000 |
| May | 25,964,130 | 111,000 |
| June | 25,408,492 | 111,000 |
| July | 25,475,468 | 136,000 |
| August | 24,219,241 | 108,000 |
| September | 25,761,741 | 92,000 |
| October | 27,613,539 | 117,000 |
| November | 28,340,663 | 120,000 |
| December | 26,418,700 | 109,000 |
| January 1971 | 16,334,472 | 83,000 |
| February | 29,204,927 | 136,000 |
| March | 27,268,211 | 149,000 |
| April | 25,620,061 | 135,000 |
| May | 24,647,648 | 136,000 |
| June | 24,769,006 | 145,000 |
| March 1972 | 24,518,015 | 125,000 |
| April | 23,937,691 | 145,000 |
| May | 28,638,973 | 170,000 |
| June | 28,910,451 | 170,000 |



| *Month* | *TELCO*[2] | *Empire*[3] |
|---|---|---|
| July | 30,230,136 | 180,000 |
| August | 31,139,490 | 185,000 |
| September | 30,714,496 | 190,000 |
| October | 33,382,223 | 147,000 |
| November | 32,150,343 | 169,000 |
| December | 31,635,815 | 178,000 |
| January 1973 | 30,140,444 | 148,000 |
| February | 30,220,451 | 180,000 |

[14] *Interrogatory 10:* During the period between July 21, 1971 and February 18, 1972, what wages were paid by plaintiffs, listed separately on a monthly basis as to each plaintiff, for (a) overtime for management employees; (b) overtime for non-supervisory employees; (c) employees borrowed from other employers and (d) extra guards?

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(1) See footnote (1) to answers to interrogatory 9(a). With respect to AT&T, the data requested in this interrogatory do not exist.

(2) Using data that reflect the number of union-represented employees and earnings per week, including vacation and overtime pay, for the week that includes the 15th of the month, average number of employees on strike during the period were multiplied by the average weekly earnings of employees for that union in each month and then multiplied by 4.3 to determine monthly amounts. Fringe benefits, pensions and medical plan contributions are treated as in footnote (2) for TELCO to answers to interrogatory 9(b). The TELCO data and computations used to prepare this answer are in the possession of Accounting Dept., General Financial Analyst, New York Telephone Company, 1095 Avenue of the Americas, New York, New York.

(3) These figures were derived from weekly payroll records converted into monthly totals by using a 4.3 weeks per month factor. The figures reflect salaries, wages, overtime, and vacation pay. Fringe benefits, pensions and medical plan contributions are treated as in footnote (2) for TELCO to answers to interrogatory 9(b).

*Defendants' Exhibit 100*

What percentage of wages to employees in (c) and (d) above were paid to employees who would otherwise have been employed by one of the plaintiffs or by a subsidiary of one of the plaintiffs? Describe the documents from which each of these figures is derived.

*Answers to Interrogatory 10(a):*[1]

| *Month* | *TELCO*[2] | *Empire*[3] |
|---|---|---|
| July 1971 | $11,922,000 | |
| August | 14,761,000 | $42,300 |
| September | 16,167,000 | 22,700 |
| October | 17,157,000 | 24,100 |
| November | 15,623,000 | 21,700 |
| December | 13,967,000 | 17,500 |
| January 1972 | 15,680,000 | 18,200 |
| February | 9,737,000 | 22,600 |

(1) These estimated figures have been rounded off. See footnote (1) to answers to interrogatory 9(a). With respect to AT & T, the data requested in interrogatory 10(a) do not exist.

(2) These figures were derived from summaries of administrative reports in the possession of Accounting Dept., General Financial Analyst, New York Telephone Company, 1095 Avenue of the Americas, New York, New York.

(3) These figures were derived from administrative reports, summarized for payroll reporting purposes, in the possession of Angelo Tomeo, Financial Staff Manager, Empire City Subway Company (Limited), 140 West Street, New York, New York. See footnote (3) for Empire to answers to interrogatory 9(a).



*Defendants' Exhibit 100*

[15] *Answers to Interrogatory 10(b):*[1]

| *Month* | *Empire*[2] |
|---|---|
| July 1971 | |
| August | $ 600 |
| September | 3,600 |
| October | 7,900 |
| November | 24,600 |
| December | 32,000 |
| January 1972 | 30,600 |
| February | 32,400 |

(1) See footnote (1) to answers to interrogatory 9(a). With respect to TELCO and AT & T, the data requested in interrogatory 10(b) do not exist.

(2) The estimated figures have been rounded off. See footnote (3) for Empire to answers to interrogatory 9(a). These figures were derived from payroll records in the possession of Angelo Tomeo, Financial Staff Manager, Empire City Subway Company (Limited), 140 West Street, New York, New York.

[16] *Answers to Interrogatory10(c):*[1]

| *Month* | *TELCO*[2][4] | *Empire* | *AT & T*[3] |
|---|---|---|---|
| July 1971 | $ 36,000 | $ 0 | $ 745,550.31 |
| August | 262,000 | 0 | 1,993,114.00 |
| September | 3,568,000 | 0 | 722,366.00 |
| October | 4,815,000 | 0 | 249,795.00 |
| November | 4,813,000 | 0 | 167,272.00 |
| December | 4,625,000 | 0 | 84,520.00 |
| January 1972 | 6,002,000 | 0 | 54,635.00 |
| February | 4,213,000 | 0 | 53,981.00 |

(1) See footnote (1) to answers to interrogatory 9(a). These figures include overtime pay.

(2) These estimated figures have been rounded off. They are derived from administrative reports in the possession of Accounting

*Defendants' Exhibit 100*

[17] *Answers to Interrogatory 10(d)*:(1)

| *Month* | *TELCO*(2) | *Empire* | *AT & T*(3) |
|---|---|---|---|
| July 1971 ..... | $ 564,000 | $ 0 | $28,686.44 |
| August ..... | 744,000 | 0 | 27,698.50 |
| September ..... | 1,081,000 | 0 | 14,742.92 |
| October ..... | 879,000 | 0 | 12,904.19 |
| November ..... | 806,000 | 0 | 13,308.72 |
| December ..... | 826,000 | 0 | 13,083.72 |
| January 1972 ..... | 961,000 | 0 | 20,777.45 |
| February ..... | 538,000 | 0 | 19,039.24 |

Dept., General Financial Analyst, New York Telephone Company, 1095 Avenue of the Americas, New York, New York.

(3) These figures include both base and overtime pay for low-level management employees borrowed for strike duty by one department from another within AT & T, Long Lines Department. They do not include management within Plant, for example, who may have worked in Plant in a non-management capacity and do not include employees borrowed from other companies, if any. The figures for July through December, 1971, include both the New York City area (including New York City, Nassau and Suffolk Counties) and the Northeastern Area (including upstate New York, all of New England and New Jersey). The figures for January and February 1972 include only the Northeastern Area, because figures for the New York Area do not exist for those months. The February 1972 figure also includes February expenses not paid until March 1972. All of these figures are derived from Summary Strike Clearance Reports generated by AT & T's payroll department at the time of the strike. These reports are in the possession of Edwin J. Russell, District Accounting Manager, AT&T, Long Lines Department, 440 Hamilton Avenue, White Plains, New York.

(4) The percentage figure requested in connection with interrogatory 10(c) does not exist.

(1) See footnote (1) to answers to interrogatory 9(a). No wages for extra guard duty were paid to employees who would otherwise have been employed by one of the plaintiffs or by a subsidiary of one of the plaintiffs.

(2) These estimated figures have been rounded off. They represent Special Guard Service charged to expense and are derived



*Defendants' Exhibit 100*

[18] *Interrogatory 11*: (a) During the period between July 21, 1971 and February 18, 1972, what were plaintiffs' approximate revenues from monthly telephone service, and for telephone installations, listed on a monthly basis and listed separately as to each plaintiff? Describe the documents from which each of these figures is derived.

(b) During the periods between January 1, 1970 and July 1, 1971, and between March 1, 1972 and March 1, 1973, what were plaintiffs' approximate revenues for monthly telephone service and for telephone installations, listed on a monthly basis and listed separately as to each plaintiff? Describe the documents from which each of these figures is derived.

from administrative reports in the possession of Accounting Dept., General Financial Analyst, New York Telephone Company, 1095 Avenue of the Americas, New York, New York.

(3) These figures are derived from a summary of bills for all contract guard service at AT & T's 32 Avenue of the Americas location in New York City. The figures for July and August 1971 also include the total amounts paid to the Gleason Guard Service for all guard service provided AT & T's Northeastern Area (White Plains) for those months, according to Gleason's records. Total figures for extra guard service do not exist in AT&T's files.

*Defendants' Exhibit 100*

*Answers to Interrogatory 11:*[1]

| | | TELCO | |
|---|---|---|---|
| | *Month* | *Monthly Telephone Service* | *Telephone Installation* |
| 11a | July 1971[2] | $67,491,896 | $ 945,768 |
| | August | 67,531,973 | 864,067 |
| | September | 67,281,241 | 883,344 |
| | October | 67,083,394 | 1,107,803 |
| | November | 67,046,845 | 1,169,022 |
| | December | 67,000,648 | 1,478,217 |
| | January 1972 | 66,701,470 | 1,141,228 |
| | February[2] | 65,549,370 | 1,356,053 |
| 11b | January 1970 | 65,789,095 | 2,111,140 |
| | February | 65,939,737 | 2,287,017 |
| | March | 66,148,407 | 1,643,702 |
| | April | 66,017,794 | 2,130,819 |
| | May | 66,452,429 | 2,160,821 |
| | June | 66,575,240 | 2,134,279 |
| | July | 66,601,008 | 2,063,378 |
| | August | 66,340,437 | 2,076,223 |
| | September | 66,620,662 | 2,096,493 |
| | October | 66,901,104 | 2,195,516 |
| | November | 66,770,915 | 2,052,892 |
| | December | 66,443,187 | 2,159,708 |
| | January 1971 | 66,747,981 | 1,602,848 |
| | February | 66,810,197 | 1,824,964 |
| | March | 66,697,145 | 2,061,805 |

(1) This interrogatory is only applicable to TELCO. These figures were derived from administrative reports in the possession of Accounting Dept., General Financial Analyst, New York Telephone Company, 1095 Avenue of the Americas, New York, New York, and are adjusted by a price index of January 1970 = 1.00 in order to account for rate changes.

(2) Data for periods of less than one month are not available.



*Defendants' Exhibit 100*

[19] *Answers to Interrogatory 11:* (continued)

| | TELCO | |
|---|---|---|
| *Month* | *Monthly Telephone Service* | *Telephone Installation* |
| April | 67,126,401 | 2,296,676 |
| May | 67,618,738 | 2,172,422 |
| June | 67,562,435 | 2,201,377 |
| March 1972 | 66,745,399 | 1,598,223 |
| April | 66,740,308 | 2,162,450 |
| May | 67,459,350 | 2,236,742 |
| June | 67,432,296 | 2,056,658 |
| July | 67,401,156 | 2,018,624 |
| August | 67,703,799 | 2,028,007 |
| September | 67,894,112 | 2,158,568 |
| October | 67,857,132 | 2,259,675 |
| November | 68,260,310 | 2,155,581 |
| December | 68,051,631 | 2,551,735 |
| January 1973 | 68,303,583 | 1,888,815 |
| February | 68,268,711 | 2,060,816 |

*Interrogatory 12:* During the periods between January 1, 1970 and July 1, 1971, and between March 1, 1972 and March 1, 1973, what amounts were paid in overtime to (a) management employees and (b) non-supervisory employees, listed on a monthly basis and listed separately for each plaintiff? Describe the documents from which each of these figures is derived.

[20] *Answers to Interrogatory 12(a):*[1]

| *Month* | *TELCO*[2] | *Empire*[3] |
|---|---|---|
| January 1970 | $2,283,981 | $ 3,300 |
| February | 2,427,102 | 5,100 |
| March | 2,389,472 | 5,400 |

*Defendants' Exhibit 100*

*Answers to Interrogatory 12(a):*[1] (continued)

| *Month* | *TELCO*[2] | *Empire*[3] |
|---|---|---|
| April | 3,089,301 | 8,100 |
| May | 2,929,980 | 8,900 |
| June | 2,432,175 | 8,000 |
| July | 1,772,674 | 4,700 |
| August | 1,249,959 | 6,600 |
| September | 1,300,529 | 3,700 |
| October | 1,702,747 | 5,000 |
| November | 1,810,701 | 6,900 |
| December | 1,655,435 | 4,700 |
| January 1971 | 6,417,596 | 4,400 |
| February | 2,504,301 | 8,400 |
| March | 2,171,173 | 5,800 |
| April | 1,875,847 | 5,300 |
| May | 1,666,991 | 6,000 |
| June | 1,483,906 | 7,500 |
| March 1972 | 2,399,171 | 10,700 |
| April | 1,975,413 | 7,900 |
| May | 1,760,390 | 8,200 |

(1) See footnote (1) to answers to interrogatory 9(a). With respect to AT & T, the data requested in interrogatory 12(a) do not exist.

(2) These figures were derived from an administrative report summarized manually by the Payroll Office from payrolls forwarded by the reporting departments showing overtime dollar amounts (number of units multiplied by dollar value) for first and second level management employees exempt from the Federal Fair Labor Standards Acts. The report does not include overtime paid to management employees who are not exempt from the law and are paid time and one half after 35 hours, which data are unavailable. Data supplied by Accounting Dept.

(3) These estimated figures have been rounded off. They were derived from administrative reports, summarized for payroll reporting purposes, in the possession of Angelo Tomeo, Financial Staff Manager, Empire City Subway Company (Limited), 140 West Street, New York, New York.



*Defendants' Exhibit 100*

*Answers to Interrogatory 12(a):*[1] (continued)

| *Month* | *TELCO*[2] | *Empire*[3] |
|---|---|---|
| June | 1,738,394 | 7,300 |
| July | 2,526,637 | 12,500 |
| August | 1,905,629 | 7,200 |
| September | 1,387,086 | 6,400 |
| October | 1,715,790 | 11,900 |
| November | 1,671,973 | 9,900 |
| December | 1,417,026 | 7,100 |
| January 1973 | 1,087,111 | 8,300 |
| February | 841,813 | 11,300 |

[21] *Answers to Interrogatory 12(b):*[1]

| *Month* | *Empire* |
|---|---|
| January 1970 | $42,600 |
| February | 42,500 |
| March | 38,200 |
| April | 41,500 |
| May | 51,900 |
| June | 44,200 |
| July | 46,900 |
| August | 60,300 |
| September | 45,500 |
| October | 63,900 |
| November | 53,900 |
| December | 51,200 |
| January 1971 | 30,300 |
| February | 56,300 |
| March | 56,600 |

(1) See footnote (1) to answers to interrogatory 9(a). With respect to TELCO and AT&T, the data requested in interrogatory 12(b) do not exist. See footnote (3) for Empire to answers interrogatory 12(a).

*Defendants' Exhibit 100*

*Answers to Interrogatory 12(b):* (continued)

| *Month* | *Empire* |
|---|---|
| April | 54,400 |
| May | 80,500 |
| June | 50,100 |
| March 1972 | 47,100 |
| April | 53,300 |
| May | 46,500 |
| June | 52,200 |
| July | 62,500 |
| August | 47,100 |
| September | 45,400 |
| October | 48,600 |
| November | 52,800 |
| December | 57,400 |
| January 1973 | 46,900 |
| February | 58,000 |

• • • • •

[25] Dated: New York, New York
May 23, 1975

Yours, etc.

ARANOW, BRODSKY, BOHLINGER,
BENETAR & EINHORN
By /s/ DAVID L. BENETAR
David L. Benetar
(A Member of the Firm)
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[DEFENDANTS' EXHIBIT 113A]

TABLE 1

MEAN LENGTH OF WORK STOPPAGES BY LOCATION FOR ALL STOPPAGES, STOPPAGES OF EIGHT WEEKS OR LESS AND MORE THAN EIGHT WEEKS
(1965-1974)

| | *New York (1)* | *Rhode Island (2)* | *Other States (3)* |
|---|---|---|---|
| *All Stoppages* | | | |
| Mean Length (Wks) | 3.5 | 3.7 | 3.6 |
| Standard Error | 0.0931 | 0.2664 | 0.0248 |
| No. Stoppages | 4,556 | 350 | 50,972 |
| *8 Weeks or Less* | | | |
| Mean Length (Wks) | 1.8 | 2.0 | 1.9 |
| Standard Error | 0.0290 | 0.1100 | 0.0094 |
| No. Stoppages | 4,068 | 304 | 44,391 |
| Pct. of All Stoppages | 89.28 | 86.85 | 87.08 |
| *More Than 8 Weeks* | | | |
| Mean Length (Wks) | 17.4 | 14.7 | 15.0 |
| Standard Error | 0.5021 | 0.7406 | 0.1022 |
| No. Stoppages | 488 | 46 | 6,581 |
| Pct. of All Stoppages | 10.71 | 13.14 | 12.91 |

[DEFENDANTS' EXHIBIT 113B]

TABLE 2

COMPARISON BY STATE OF MEAN LENGTH OF WORK STOPPAGE FOR STOPPAGES LASTING OVER EIGHT WEEKS
(1965-1974)

| *State* | *Mean Length* | *Std Error* | *Stoppages* |
|---|---|---|---|
| AL | 14.984 | 0.5573 | 157 |
| AK | 14.294 | 0.9578 | 17 |
| AZ | 13.722 | 0.9633 | 38 |
| AR | 16.710 | 1.0458 | 66 |
| CA | 14.493 | 0.1227 | 522 |
| CO | 14.852 | 1.1558 | 54 |
| CT | 15.596 | 0.7963 | 106 |
| DE | 15.130 | 0.9176 | 34 |
| DC | 17.509 | 3.3880 | 23 |
| FL | 16.029 | 0.4720 | 165 |
| GA | 14.599 | 0.6125 | 102 |
| HI | 15.420 | 2.1234 | 17 |
| ID | 17.634 | 2.1242 | 23 |
| IL | 14.483 | 0.2197 | 401 |
| IN | 15.204 | 0.1828 | 239 |
| IA | 14.092 | 0.6308 | 123 |
| KS | 13.962 | 0.8903 | 56 |
| KY | 14.213 | 0.5436 | 168 |
| LA | 15.228 | 0.8485 | 89 |
| ME | 14.370 | 1.1520 | 27 |
| MD | 15.928 | 0.4335 | 101 |
| MA | 14.342 | 0.2567 | 207 |
| MI | 15.407 | 0.2373 | 413 |
| MN | 13.473 | 0.7447 | 96 |
| MS | 13.911 | 1.0503 | 37 |
| MO | 15.062 | 0.3520 | 253 |
| MT | 14.038 | 1.0746 | 30 |
| NB | 17.571 | 1.3150 | 39 |
| NV | 16.781 | 1.4999 | 32 |
| NH | 18.248 | 2.7088 | 19 |
| NJ | 14.472 | 0.2020 | 262 |



*Defendants' Exhibit 113B*

TABLE 2 (*Continued*)

| *State* | *Mean Length* | *Std Error* | *Stoppages* |
|---|---|---|---|
| NM | 16.577 | 1.7591 | 28 |
| NY | 17.390 | 0.2043 | 488 |
| NC | 16.882 | 0.8949 | 70 |
| ND | 14.248 | 1.2762 | 19 |
| OH | 14.504 | 0.0909 | 631 |
| OK | 14.414 | 0.7685 | 59 |
| OR | 14.614 | 0.8938 | 88 |
| PA | 14.372 | 0.0290 | 704 |
| RI | 14.668 | 0.7406 | 46 |
| SC | 16.673 | 1.3149 | 38 |
| SD | 14.348 | 1.8072 | 16 |
| TN | 16.184 | 0.4854 | 185 |
| TX | 15.696 | 0.4187 | 230 |
| UT | 15.164 | 1.8712 | 27 |
| VT | 19.611 | 1.8650 | 18 |
| VA | 17.378 | 0.9920 | 90 |
| WA | 15.002 | 0.6575 | 125 |
| WV | 15.897 | 0.6422 | 139 |
| WI | 15.309 | 0.1688 | 188 |
| WY | 14.214 | 1.8060 | 10 |

ANALYSIS OF STRIKES LASTING MORE THAN EIGHT WEEKS IN NEW YORK AND RHODE ISLAND COMPARED TO THE REST OF THE NATION

[DEFENDANTS' EXHIBIT 122A]

| Industry | Number of Strikes: New York and Rhode Island | Number of Strikes: All Other States | Mean Length of Strikes (Weeks): New York and Rhode Island | Mean Length of Strikes (Weeks): All Other States | Standard Error of Difference | t-Statistic | Disparity in Strike Length |
|---|---|---|---|---|---|---|---|
| | (1) | (2) | (3) | (4) | (5) | (6) | (7) |
| Wholesale Trade | 21 | 182 | 20.59 | 13.46 | 2.59 | 2.75 | 7.13 |
| Nonelectrical Machinery | 25 | 320 | 17.56 | 15.03 | 1.24 | 2.04 | 2.53 |
| Apparel | 13 | 57 | 20.14 | 14.24 | 3.52 | 1.68 | 5.90 |
| Miscellaneous Services | 11 | 38 | 19.87 | 14.49 | 3.34 | 1.61 | 5.38 |
| Food Stores | 1 | 38 | 25.86 | 15.38 | 6.62 | 1.58 | 10.48 |
| Transportation Manufacturing | 6 | 144 | 22.74 | 14.47 | 5.47 | 1.51 | 8.27 |
| Instruments | 4 | 26 | 23.21 | 12.13 | 7.39 | 1.50 | 11.08 |
| Unclassified | 5 | 91 | 22.03 | 17.66 | 3.33 | 1.31 | 4.37 |
| Eating and Drinking Establishments | 6 | 41 | 17.69 | 13.26 | 3.60 | 1.23 | 4.43 |
| Autodealers | 11 | 76 | 22.62 | 15.27 | 6.25 | 1.18 | 7.35 |
| Public Services | 3 | 16 | 22.67 | 14.70 | 7.04 | 1.13 | 7.97 |
| Amusements | 3 | 9 | 21.67 | 12.65 | 8.13 | 1.11 | 9.02 |
| Chemicals | 11 | 129 | 16.55 | 14.02 | 2.34 | 1.08 | 2.53 |
| Building Materials | 2 | 15 | 25.86 | 13.72 | 11.64 | 1.04 | 12.14 |
| Furniture Manufacture | 10 | 41 | 16.09 | 13.18 | 2.93 | 0.99 | 2.91 |
| Utilities | 1 | 42 | 18.86 | 14.56 | 4.99 | 0.86 | 4.30 |
| General Retail | 2 | 36 | 33.64 | 14.34 | 23.81 | 0.81 | 19.30 |
| Furniture Sales | 3 | 12 | 20.19 | 12.74 | 9.87 | 0.75 | 7.45 |
| Lumber | 2 | 65 | 25.36 | 14.70 | 15.53 | 0.69 | 10.66 |
| Paper | 5 | 79 | 17.11 | 14.09 | 4.53 | 0.67 | 3.02 |
| Stone, Clay and Glass | 3 | 160 | 17.81 | 14.50 | 5.26 | 0.63 | 3.31 |



*Defendants' Exhibit 122A*

| Industry | Number of Strikes: New York and Rhode Island | Number of Strikes: All Other States | Mean Length of Strikes (Weeks): New York and Rhode Island | Mean Length of Strikes (Weeks): All Other States | Standard Error of Difference | t-Statistic | Disparity in Strike Length |
|---|---|---|---|---|---|---|---|
| Commmunication | 8 | 76 | 16.14 | 14.43 | 3.00 | 0.57 | 1.71 |
| Fabricated Metals | 9 | 256 | 15.44 | 14.45 | 2.45 | 0.40 | 0.99 |
| Other Transportation | 5 | 45 | 14.26 | 13.23 | 2.97 | 0.35 | 1.03 |
| General Contracting | 36 | 330 | 13.48 | 13.14 | 1.16 | 0.29 | 0.34 |
| Miscellaneous Manufacturing | 4 | 34 | 16.25 | 15.82 | 2.03 | 0.21 | 0.43 |
| Medical Services | 1 | 51 | 16.43 | 15.38 | 6.62 | 0.16 | 1.05 |
| Public Transportation | 8 | 45 | 16.36 | 16.04 | 3.45 | 0.09 | 0.32 |
| Hotels | 1 | 15 | 13.86 | 13.47 | 5.82 | 0.07 | 0.39 |
| Metals Mining | 1 | 11 | 18.00 | 17.82 | 10.33 | 0.02 | 0.18 |
| Primary Metals | 11 | 166 | 17.05 | 17.16 | 3.72 | -0.03 | -0.11 |
| Minerals Mining | 1 | 20 | 14.00 | 14.81 | 5.12 | -0.16 | -0.81 |
| Trucking | 10 | 104 | 15.41 | 15.90 | 2.47 | -0.20 | -0.49 |
| Movies | 1 | 8 | 15.86 | 20.02 | 18.31 | -0.23 | -4.16 |
| School | 2 | 4 | 10.21 | 11.39 | 3.00 | -0.39 | -1.18 |
| Leather Goods | 1 | 10 | 11.29 | 16.04 | 10.67 | -0.45 | -4.75 |
| Other Local Government | 1 | 2 | 8.14 | 11.50 | 4.08 | -0.58 | -2.36 |
| Printing and Publishing | 14 | 104 | 16.24 | 17.63 | 1.90 | -0.73 | -1.39 |
| Retail | 1 | 9 | 8.71 | 13.41 | 4.51 | -0.82 | -3.70 |

| *Industry* | *Number of Strikes* *New York and Rhode Island* | *All Other States* | *Mean Length of Strikes* *New York and Rhode Island* | *All Other States* | *Standard Error of Difference* | *t-Statistic* | *Disparity in Strike Length* |
|---|---|---|---|---|---|---|---|
| | | | (*Weeks*) | | | | |
| | *(1)* | *(2)* | *(3)* | *(4)* | *(5)* | *(6)* | *(7)* |
| Air Transportation | 8 | 87 | 14.66 | 16.57 | 1.94 | –0.98 | –1.91 |
| Food | 5 | 164 | 11.71 | 14.47 | 2.12 | –1.30 | –2.76 |
| Auto Repairs | 2 | 6 | 11.43 | 18.26 | 5.21 | –1.31 | –6.83 |
| Textiles | 4 | 21 | 13.54 | 16.92 | 2.27 | –1.49 | –3.38 |
| Real Estate | 4 | 9 | 9.29 | 17.32 | 4.22 | –1.90 | –8.03 |
| Electrical Machinery | 5 | 133 | 11.23 | 15.06 | 1.05 | –3.65 | –3.83 |
| All Industries | 291 | 3,327 | 17.18 | 14.80 | — | — | 2.38 |
| Average of Difference* | | | | | | | 2.41 |

* Each disparity in strike length weighted by the number of strikes in that industry, in New York and Rhode Island, and divided by the total number of strikes in New York and Rhode Island.

Source: U.S. Department of Labor, Bureau of Labor Statistics, Computer tape of Analysis of Work Stoppages, 1968-1973



**Testimony**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Judge RICHARD OWEN

73 Civ. 4557

NEW YORK TELEPHONE COMPANY, *et al.*,

—v.—

NEW YORK STATE DEPARTMENT OF LABOR, *et al.*

Appearances:

ARANOW, BRODSKY, BOHLINGER, BENETAR & EINHORN, 469 Fifth Avenue, New York, New York 10017. By: DAVID L. BENETAR, Esq., STANLEY SCHAIR, Esq., MARK H. LEEDS, Esq. *For the Plaintiffs.*

LOUIS J. LEFKOWITZ, *Attorney General of the State of New York*, Two World Trade Center, New York, New York 10047. By: MARIA L. MARCUS, Esq., NICHOLAS G. GARAUFIS, Esq., STUART GREENBERG, Esq. *For the Defendants.*

[80] Testimony of RAYMOND E. WILLIAMS; Direct Examination by Mr. Benetar:

• • • • •

[86] Q. During 1971 how was collective bargaining with CWA conducted in the Bell System? A. Well, in 1971 and in the past years bargaining was conducted on what is referred to as a pattern bargaining concept. Under this concept the CWA International designated, normally, two companies in the Bell System as pattern setters. Usually these two companies were those with an early contract termination date and one was usually an operating company and one was one of the nationwide units, such as Longlines or Western Installation, and so forth.

In such negotiations the subject matters were generally referred to as either national or local. The national items would consist of those that had broad application to all Bell System non-management employees across the system, and the local items would be those that were pertinent to a specific bargaining unit and generally were in part of their contract language, et cetera. Now, national items would include things such as basic wages, union security, pensions, welfare and health payments, benefits, and where the local items would be more of a contract construction [87] and may involve things such as the application of overtime, board and lodging, travel allowances, grievance procedure, and so forth. In the pattern bargaining concept, where bargaining was taking place in a number of companies simultaneously, the key bargaining on the national items was taking place in so-called pattern setters and the companies that were not pattern setters generally looked to those companies to see what the settlement would be and once settlement was made, was reached in the so-



called pattern setters on the national items, they became the standard with which the other companies settled those items in conformity, and then bargaining would wrap up or continue on the local items, and so forth, and complete contracts would be obtained.

Q. I think you have told us that this had been the practice prior to 1971 and was the practice in 1971? A. That's correct.

Q. In 1971 which Bell System companies were selected by CWA as the pattern setters? A. The Chesapeake & Potomac Company and Western Electric Installation.

Q. And Chesapeake & Potomac was an operating company? A. That's correct.

Q. Similar to New York Telephone Company, in its [88] function? A. Yes.

Q. And Chesapeake & Potomac, was that a State-wide bargaining unit there? A. It was a multi-State.

Q. And Western Electric, was that a State-wide unit or broader in scope? A. No, it was Western Electric Installation, which covered the entire country.

Q. When were their collective bargaining agreements with CWA due to expire, that is, the two you just mentioned, C & P and Western? A. On April 30, 1971.

Q. When were the others due to expire, the other Bell System Company contracts? A. Well, many of them in 1971 expired on April 30 also, but then they were scattered throughout the late Spring and the early Summer months, with a few—I think a couple of them were September of 1971.

Q. When did the negotiations begin with the pattern setters? A. Western Electric Installation started on April 1 of 1971 and C & P on April 15.

Q. April 15? A. 1971.

[89] Q. Were agreements reached by the pattern setters prior to their contract expiration on April 30? A. No, they were not.

Q. What action was taken with respect to those contracts? A. Well, the contracts in those two units were mutually extended on a day-by-day basis until July 14, 1971.

Q. All right, we will come back to July 14 a little later.

Were similar extensions granted with respect to other Bell System contracts? A. Yes. All the contracts with CWA expired and were extended similarly on a day-to-day basis.

Q. Were any collective bargaining agreements reached between CWA and the Bell System companies before July 14, 1971? A. No, they were not.

Q. What occurred on that day? A. On July 14, 1971, the CWA began a nationwide strike against the Bell System and all the companies in which they represented employees.

• • • • •

[94] Q. How were the ratification votes taken? A. By mail.

Q. Were they counted separately for each bargaining unit? A. Yes.

Q. So that in a company where the union had a national bargaining unit the majority across the nation would decide the question? A. On the nationwide units, yes.

• • • • •

[97] Q. Were the CWA bargaining units for New York Telephone and Empire trying to obtain a more advantageous settlement for them than that which had been ratified



in every CWA unit throughout the country? A. Yes, they were.

• • • • •

[98] Q. Was there a Bell System operating company in Rhode Island in 1971? A. Yes, New England Telephone & Telegraph.

Q. Approximately how many CWA-represented employees worked for New England Bell in 1971? A. About 965.

Q. Were they in two units? A. Yes, there were two distinct bargaining units. One was a directory advertising —clerical unit, which had about 830 employees, and one [99] was the directory advertising sales unit, which had 135.

Q. Did each bargaining unit of these two in New England Bell vote separately in its own collective bargaining unit with New England Bell? A. Yes, they did.

Q. Of the 830 in the clerical unit, approximately how many CWA-represented New England Bell employees worked in Rhode Island at that time? A. Four.

Q. Of the 135 in the sales unit, approximately how many CWA-represented New England Bell employees worked in Rhode Island? A. About 20.

Q. The vote of the entire unit in the entire local decided the question? A. Yes, it did.

• • • • •

[100] Q. Did there ever come a time in bargaining after August 14 when the union submitted a new set of national and local demands, and I am talking about the CWA in their dealings with New York Telephone Company and Empire? A. Yes, we had a new list of demands submitted.

Q. I show you Exhibit 390 and ask you whether these are the demands you received? A. Yes, they are.

Q. Briefly summarize for the Court in what respects these demands differ from those in the contract settlement agreed upon by CWA but rejected in the ratification vote in New York, please. A. Well, they wanted—speaking of the demands, the demands called for greater premium payments for Saturday and Sunday work, substantial increase across the board in the basic wages. They wanted a full union shop versus a modified agency shop that was granted in the original July 18 contract. They were looking for more weeks of vacation with less years of service. They were also looking to upgrade, to higher wage level specific jobs, looking to include certain up-State cities in higher wage zones. They were also demanding increased payments to certain benefit funds. They wanted to—

Q. What do you mean by benefits. Are you talking about [101] hospitalization or other fringe benefits? A. Well, specifically, in 1971, at this time they were looking for payment on a dental plan and an eye prescription program and some type of drug prescription payments.

Q. All of these demands are different from the ones in the settlement? A. Yes, they are over and above what was in the settlement. They also in 1971—we bargained for the first time in July, what we referred to as the central city allowance, and the demands in August, 1971, wanted us to expand the geography covered by that—originally as bargained it was confined to just four boroughs in New York City and they wanted to extend it entirely down-State and they wanted a higher dollar allowance per day on that. Also in July of 1971 for the first time we in the Bell System bargained a cost of living clause and it was keyed



to rises in the U.S. Average City Consumer Price Index, and the CWA's demands in August of 1971, following failure to ratify, wanted to key the payment of escalator clauses to the local New Jersey, New York metropolitan region. On top of that, they had demands to restrict the company's ability to utilize overtime and there were other, what I will refer to as, non-economic demands in the area of [102] bargaining—contracting out bargaining unit work, grievance procedure, absence treatment, and so forth.

Q. Which of these increased demands which you have been summarizing for us were what you might call, in the parlance of your negotiations, national items? A. Well, the basic wage pattern, the cost of living, the Saturday and Sunday premium, vacations, the dental plan, eye prescriptions, drug prescriptions, and the benefits, those would be considered national.

Q. Did the company offer any increase over the pattern settlement during the remainder of 1971? A. No, we did not.

Q. Did there come a time when the settlement was finally reached? A. Yes.

Q. When and how did this come about? A. Well, in January of 1972 J. Curtis Counts, who was then Director of the Federal Mediation and Conciliation Service, entered the negotiations and through his efforts in early February of 1972 he proposed a settlement which the union agreed, the CWA International agreed to submit to their membership for ratification and which the company agreed they would support, and a ratification vote was taken and this proposal was ratified on February 16, 1972, and we executed [103] an agreement, a strike settlement agreement and

return to work stipulation the following day and the employees returned to work on February 18, 1972.

• • • • •

[104] Q. On and after February 18, 1972, did the New York Telephone and Empire strikers return to their jobs? A. Yes, they did.

Q. By the way, on an average day during the strike, approximately how many New York Telephone Company employees remained away from work? A. About 30,000.

Q. And did Western Electric and AT&T long line employees in New York return to their jobs at the same time that New York Telco employees returned? A. Yes, they did.

Q. Now, I show you Exhibit 387. Was this the contract signed pursuant to the February 16th ratification? A. Yes, it is.

Q. And did that contract differ from the settlement which had been reached on July 18, 1971? A. Yes, it did.

Q. In what major respects did this contract differ from the original pattern settlement with CWA? A. Well, the major items contained some basic wage increases for certain job titles, certain occupational classifications, and certain locations, and it contained an agency shop provision of union security versus a modified agency shop provision [105] that was in the July 18, 1971, contract. And that's the first time we have had that provision in the Bell System. And we also had a provision of paying differential in this contract for Saturday work when it was a fifth scheduled day of the work week for any of our employees, and that was the first time we paid that type of allowance in the Bell System.



Q. Anywhere in the company, in the Bell System? A. Anywhere in the Bell System.

Q. The first time. A. Now, there were also some changes —these were the major changes. The other changes basically centered around overtime treatment, and it involved some restrictions or qualifications on the company about how much overtime could be assigned in a given week and advance notification on the assignment of overtime, and so forth.

Q. Was the wage increase a flat across the board amount or did it vary? A. No, the wage increase called for a specific dollar amount.

Q. How much? A. Well, it called for one dollar a week and top rate for the top two bands of job classifications, the two bands of the job classification we had paying the [106] greatest amount of money at that time, and that was applicable downstate, and it called for $1.50 for the same two job bandings upstate, but that did not mean that everybody within those bandings got that, it was only those people that were at maximum rate and then it kind of feathered down through a wage progression.

Q. These are above the July 18th settlement? A. Oh, absolutely.

Q. To your knowledge had ever previously a settlement been made with higher wages than those contained in the pattern settlement? A. No, not to my knowledge.

Q. Were there with any other national items, such as agency shop and differential pay for Saturdays? A. Not to my knowledge.

Q. These were break-throughs? A. Yes, they were.

Q. Now, was there any strike in the Bell System prior to the 1971-72 strike in New York State—withdrawn.

I think you have answered.

Are you aware of any attempt by strike in the Bell System prior to the 1971 to achieve a break-through on an agreed upon pattern settlement? A. No, I don't.

[107] Q. Now, before the strike period, in your capacity as assistant vice president for labor relations throughout the state, and later as director of labor relations for New York Telephone, have you kept yourself informed as to the statements of CWA and its locals on matters affecting labor management relations? A. I try to do so to the best of my ability.

Q. How do you keep yourself informed on these matters? A. Well, with the CWA, I have many face-to-face meetings on a going basis, or many telephone contacts with the officials of the CWA International, and/or even with some of the local people, the local officers of the various locals throughout the state from time to time. My job is totally from a corporate standpoint, however, functioned toward the CWA International. We have various communications, written communications, letters, letters of agreement, so I try and keep myself—as a matter of fact doing the daily job, you are kept informed of their daily attitudes even outside the bargaining years because of various contract provisions. We have maybe even, though, what may be considered bargaining sessions from time to time as the contract calls for negotiations of changes in job rates and so forth. So we have a lot of daily contact.

[108] Q. How about these recorded telephone messages; do you have any system of keeping yourself informed about them? A. Well, the recorded messages, which most of the locals have throughout the state, yes, I play a lot of them myself from time to time. It depends. If we are having



a particular problem I will play them myself a lot, play the calls myself from time to time, but we also as a procedure within the company where I get daily a transcript of what each of the tapes say. I get it and I have it distributed to certain other management people around the company, mainly down here in New York City. I think we might have 130-135 of these distributed every day to management people.

Q. Copies of them? A. Yes, complete sets of all the tapes of that day. Now, we don't—I guess my point is that if it does not change from day to day we only put those in that are new each day, but I get a packet of them every day.

Q. How do you obtain or learn the telephone number? A. The telephone numbers are well known. The telephone numbers are published in a lot of the local—the locals' publications, the Generator here in New York, 1109 News in Brooklyn. They publish the numbers so the employees [109] will know where they can call.

Q. Now, during the course of your relationship with the union and its officials, do you see many or most of the letters that the local unions send to their members? I am talking about open letters, not personal letters. A. Well, I get a lot of the CWA mailings. You know, I'm on the mailing list for, say, the CWA News, which is the international's monthly or bi-monthly newspaper issued from their Washington office. And I am on the mailing list for a lot of the local newspapers. They automatically put us on the mailing list because they find it advantageous for them too if we can stay abreast of some of the things that are of their concern, and so forth.

As far as other actual letters go, yes, from time to time

we see them, as I am sure they see ours if it is in our relationship. I don't mean to kind of take it literally. We have CWA letters or bulletins posted on our bulletin boards, or the members have them. So, we have access and see most of theirs as I am sure they see most of the ones that we issue.

Q. And what about the strike bulletins during the period of the strike, do those come to your attention? A. Yes, [110] we got copies of all of those, because many times they were distributed, or people on the picket lines, employees on the picket lines had them, and we would have access to them.

Q. Now, did you before coming to court go through, for example, the recorded messages that we had in our files? A. Yes, I did.

Q. And did you find that you had been quite familiar with their contents at the time the events were taking place? A. Certainly during the strike particularly. I not only had access to those but during the strike I played the tapes in good part myself.

Q. And others of the bulletins and letters that are put in evidence here? A. Yes, sir.

Q. Now, do you keep yourself informed in this manner in the regular course of the performance of your duties? A. Yes, I think I have to.

Q. During the 1971-72 CWA strike, did you become aware through union communications, or otherwise, that the strikers were receiving various forms of financial [111] assistance? A. Yes, I did.

Q. And what type of financial aid to strikers did you become aware of? A. Well, there were many communications on the unemployment payments, also many references



and communications regarding payments from the CWA Defense Fund, and directions and information concerning welfare payments, or food stamps, wherever applicable.

Q. From what source did you become aware of these facts—source or sources? A. Well, they were in some of the letters and some of the strike bulletins, but I think probably the main source to me was the reported messages that seemed to give the people direction as to the timing of making application and how they are to do it. I specifically recall that with the unemployment compensation they even told them what days to report by the last four digits of your Social Security number, so that the offices would not be overwhelmed by the numbers of people that might show up.

Q. Did you get any information on unemployment insurance payments from inside the company? A. Oh, yes. Sure, because I was aware of that constantly. One of my [112] coordinates, who was an assistant vice president at the time, had charge, among other things, of the unit that we have that process the unemployment insurance claims, and I was very close to him, and he kept me informed as to the level of the payments and the number of people receiving them, and he kind of kept me on a going daily basis aboard on where we stood.

Q. Did you say that this subject had come up on one occasion or more at the bargaining table, unemployment insurance payments? A. It came up on a couple of occasions I believe at the bargaining table.

Q. What information did you receive as to the extent of each form of aid received by the strikers? A. Well, I was aware very obviously from our own standpoint as to how many people, how many of our employees, were re-

ceiving unemployment compensation, the 29,000 or so, and that we ended up paying, I think in the New York fund, something around $43,000,000, and it was kind of an ongoing basis of what our payment was. There was not really as definite information perhaps on welfare and the food stamps. I never did see any dollar figures on either of those. I did note that at one time I heard or saw that perhaps a maximum of a thousand people received some type [113] of welfare fund. But I don't have the facts on those as I knew from—

Q. That was the highest estimate you ever heard? A. Yes, the highest one—maybe the only one—but it was the highest one by far.

As far as the CWA Defense Fund, of course on the local tapes, each local was saying how many people or how much money I think—more than tapes, recorded messages—as to how much they allotted to their members in the various locals on a going basis, and you could see as the strike kept—the longer the strike went, obviously the greater amount that was coming out of the CWA Defense Fund, and it was finally announced that the strike fund paid out something like $15,000,000. And I was also very aware of the fact that the strike fund stopped, in effect, paying any food assistance once people got the unemployment compensation. They kind of relied I think on the unemployment compensation.

Q. Did they announce when the unemployment insurance payments were to begin that no further food assistance would be given from the union strike fund? A. They did. So, this is the basic information that I had. I was very carefully aware of the fact that the unemployment insurance payments were the only really unconditional payments.



[114] I say that because with everything else, to get strike funds, you had to be on the picket line, and number 1, you had to also produce need, whether it was on mortgage money or car loans, something like that, as you would with welfare and the food stamps. It seemed to me the unemployment compensation became the whole basis because that was the only one that was unconditional there, and was available by the size of the fund and the number of the payments, the length that you could receive payments for a much longer period of time than the CWA Defense Fund could hold out because that was announced that—I think the CWA announced it was getting close to exhausting their defense fund.

Q. When? A. Near the end of the strike.

Q. Now, how did this subject of unemployment insurance benefits arise at the bargaining table? A. Well, I can't recall the exact date, but it was in early September when the employees became eligible for the initial payments, which I believe was an eight-week period, or seven weeks and seven days—but at the end of that period, in one of the bargaining sessions, Mr. Sanchez, who was the chairman of the union's bargaining team, took us on across the [115] table very angrily and said to the union's knowledge that the Telephone Company was attempting to postpone the payments of unemployment compensation, the initial payments of unemployment compensation, to any of the strikers. And he stated that the union was very upset about this, that Mr. Byrne, their president, president of the international, CWA international, had stated that the company would have the union at its throat for the next ten years if we tried to delay the initial payment of unemployment

compensation to the strikers. And he also said that this could mean real war between the company and the union.

Well, as a spokesman for the company team, I advised them I did not know or had any idea we were holding up these payments, but I would verify it, and at the next break that morning or afternoon, I got hold of the assistant vice president, this one I referred to previously, that had charge of this unit, and he advised me that no, the New York Telephone Company was not delaying the processing at all. As a matter of fact, he told me at that time they had already processed 25,000 claims and that there was no delay whatsoever. And we came back and advised the union bargaining team of that fact.

Q. I show you Exhibit 161 and ask you whether these are the minutes of the meeting where that came up.

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[116] The Witness: These are the company minutes. These indicate that—here is my response back to him on the 9th of September, in answer to his question about the—

Q. You don't have to repeat that. I just want to know whether those are the minutes kept by the company in connection with the meeting at which the event you have just described occurred? A. Yes, they are.

• • • • •

[120] Q. Going forward from where we left off yesterday, do you know what the average pay of bargaining unit employees in the CWA, New York Telephone Company bargaining was before the strike? A. Yes, I do.



Q. What was it? A. The average straight time basic wages was $149.60 a week.

Q. What did that come to in take-home pay? A. It would have averaged about $120 a week.

Q. And they were receiving from unemployment insurance $75 a week? A. That's correct.

[121] Q. Were you called upon—

The Court: The average take-home was what?

The Witness: The gross was $149.60 a week and with deductions for tax, Social Security it averaged about $120 take-home.

The Court: Okay.

Q. Were you called upon from time to time in the course of your duties to estimate for the company the probable duration of the strike? A. Yes, I was.

Q. In what connection were you called on to do that? A. Well, it is an ongoing process. I think with any company on strike to attempt to evaluate and to balance the significance of what the issues are in the strike versus what the demands on a struck company are and attempt to balance those against what is the probable duration of not having our employees on the job.

Q. After the rejection vote of August 14th, I believe it was, 1971, is that right? A. That's right.

Q. Did the parties reconvene for negotiations, and when I say parties I mean the International Union and New York [122] Telephone Company? A. Yes, we did.

Q. At about September, 1971, after you reconvened and following the rejection of the pattern settlement did you in the course of your duties make a projection as to the

effect of unemployment insurance on the probable duration of the strike? A. Yes, we did.

Q. What was that projection? A. Well, we recommenced negotiations the last day or two of August or the first day of September, about the 1st of September, and this was coincidental pretty much with the expiration of the eight-week suspension period in which strikers would have to wait before becoming eligible for unemployment compensation. At the time we reconvened negotiations and we looked at the demands that we discussed yesterday and we realized that the strikers had already gone through eight weeks of strike without remuneration or financial assistance of any type and when we looked ahead and now they were receiving unemployment compensation it was our judgment that we are going to have a longer strike than what we anticipated initially. It was also my judgment that the strike could last a substantial period of time, hopefully perhaps it would end before the first of the year.

[123] Q. The first of the year of 1972? A. That's right.

Q. Did the company make a decision after that projection that it would settle at that time? A. The company made a decision it would not settle at that time.

Q. What factor or factors led to the decision not to settle at that time? A. After review of the situation, the new demands, the number of people we had out, all the factors you would normally consider during a strike, it was our decision that the principle that was at issue were the strike was just too important for us to accede to any of the demands, particularly those that had the national application of breaking the pattern, it was too necessary for us to stick to that princple. We decided that we would not yield to the strikers and that we would hold our position. On



top of this certainly our position still held that the offer that we had made on July 18th or the offer that was made and accepted but later rejected by the membership on July 18th was a very fair and reasonable offer and we felt that it met the needs of our employees and we were also guided somewhat by the fact that the international must have because they approved it and recommended ratification of [124] the offer.

Q. You mentioned in the course of your answer the consequences of a settlement at that time on the future. Would you be more explicit. A. The consequences were if we acceded to the demands particularly in these areas of the national demands that we would destroy pattern bargaining and if pattern bargaining were destroyed we would be in a whipsawing situation that could only lead to labor turmoil in both the Bell System and the New York Telephone Company. We felt that was the principle we had to defend and so we decided to continue to take the strike.

Q. After the first of the year in 1972 did you have occasion in the regular performance of your duties as chief negotiator to express your opinion as to the probable duration of the strike looking at it from that vantage point after the first of 1972? A. Yes, I did.

Q. What was your opinion at that time? A. Well, the first of the year had come and gone and there was no return to work movement which we may have anticipated earlier in the strike. And we saw or it was my judgment along with some other people in the companies that we would have no return to work movement without some movement on [125] the companies' part in the area of the demands of the union and we saw no reason to believe that the strike would end for at least another six months perhaps without

that movement on our part because the employees had not returned to work, they were still eligible for six plus months of unemployment compensation and we saw no reason that they would return to work.

Q. Would you say that the availability of unemployment insurance was an important factor in inducing the company to agree to settle along the lines of the mediator's recommendations? A. Yes, it was.

Q. What part did it play in your consideration? A. Well, as I said, in early January of 1972 we had already had six months of strike. We did not see an end to it—again I say an end to it by return to work without movement on our part so we sat there in our judgment still facing a long strike. By the same token after having been on strike for six months we began—we had felt that we were beginning to feel more severely the internal pressures that any company feels on strike. We were under pressure from the business communities in the various areas we serve around the state to end the strike and get back to a normal [126] operation. We had many businesses particularly urging us to end this strike because the one portion of the telephone industry that suffers most during a strike or perhaps even suffers at all to a great degree is that of installation. We try to take care of emergency installations but that is the part of the job that suffers the most. So we had many businesses now after six months on strike that had been unable to move and we had businesses that had built new buildings, had built new headquarters, they were unable to move, the leases were expiring where they were, we had other businesses that had expansion plans and they just weren't able to carry those plans out as long as we could not install telephones for them. So we were under



growing pressure as time went on to end the strike because we were in effect hurting business operations. On top of this as we went into the first of the year with no return to work and again facing a long strike we were aware that our balance in the New York Telephone Company's unemployment fund in the State of New York, which had started with well over $40,000,000 in it, considerably over $40,000,000 in it when the strike started, we were aware that that balance was going down very quickly and was approaching a negative balance and we were also aware that the same businesses that were concerned about our [127] inability to take care of their needs from an installation standpoint, that these very businesses as contributors to unemployment in the State of New York were also going to have to start paying for the strike of the New York Telephone Company. We kind of had a dual problem here that we were both not giving them service and at the same time we may be in a position or situation that they would have to support or pay for a strike at our company. This just put greater pressure on us. It was these considerations that led us to seek aid from the federal mediator to see if we could effect some type of settlement at that particular point in time. Unemployment was very important because that was the one key to our thinking that said the strike is going to continue for a prolonged period of time.

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[130] Cross Examination by Mrs. Marcus:

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[160] The Witness: When the strike first started, I think I stated yesterday, that we had about 38,000 people out [161] on strike.

As the strike continued, however, in the failure to ratify, the strike continued, we didn't have 38,000 people of the CWA unit out at that time. It averaged more about 30,000 at that period of time, that's what I want to clarify. . . .

• • • • •

[180] Q. You stated that it was your impression that 30,000 employees rather than 38,000 were on strike on the average during the course of this period? A. Yes, I did. [181] Q. What do you base that estimate on? A. Well, during the negotiations, particularly the negotiations that started in—renegotiations really that start in late August, as a matter of regular business I had a report every day of how many people were working and how many people were not working.

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[187] Excerpts from Deposition Testimony of Communications Workers of America, by and through its Vice President, Morton Bahr, on Direct Examination by Mr. Schair; Read into the Trial Transcript by Mr. Schair:

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[189] "A. The negotiations with Bell are totally controlled by the President of CWA. No agreement can be signed with any Bell company without the President's specific approval. To follow through, the function that the Vice-Presidents, any one of the 12, may play may be of one to recommend.



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[190] "A. Well, up through 1971 we negotiated what was known as pattern bargaining where the President selected a specific bargaining unit within the Bell System to be a pattern setter. If the negotiations were pursued in the pattern setter and pretty much every Bell company marked time on those items which were uniformly applied throughout the Bell System until the pattern was established. The pattern is established when the International Executive Board says we have a contract subject to ratification.

"Q. Wasn't there a pattern setter chosen for the 1971 negotiations? A. Yes.

"Q. Do you know whom it was? A. Western Electric Installation."

Now to page 13, line 6:

"Q. How far back does this pattern approach to negotiations go in the Bell System so far as you know? A. As far back as I recall."

Page 14, line 4:

"Q. Do you know of any instance where an operating company struck to go above the pattern and did succeed in going above the pattern? A. New York is one.

"Q. When you say New York, you mean in 1971? A. [191] Yes.

"Q. Is there any other you know? A. There are strikes by non-CWA unions and Bell. I just don't recall what the settlements were.

"Q. I am just talking of CWA. A. I don't recall any."

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[193] "Q. Can a local go on strike without authorization of the International? A. Yes, but it would not be eligible for defense fund assistance and would actually be in violation of our constitution.

"Q. What other types of assistance does a defense fund grant during a strike? A. Mortgage payments, rent payments, installment payments on automobiles as long as the automobile wasn't purchased during the strike, furniture, appliances, uncovered medical costs, emergencies such as hot water boiler blowing up in the winter time, things of that nature."

"Q. Are these types of funds disbursed entirely on need? A. Need is the critical word in the defense fund rules.

"Q. What is the waiting period for this type of assistance? A. It varies. It is spelled out. It is 30 days, I believe, for rent and mortgage and 60 days for appliances.

"Q. Does the fund ever give outright grants of money [194] without a particular showing of need to all employees on strike, that is, other than grants for good? A. It does not unless you want to categorize one of the exhibits, a letter from President Beirne to the members, stating the International Executive Board by the two-thirds vote that is required to change the rules upon a strike did give a single grant at Christmastime of $50 per member. I forget the exact amount.

"Q. And that was during the 1971 strike? A. Yes."

Page 44:

"Q. In considering need, would they consider other sources of income? A. Yes.



"Q. Would they consider, for example, if a wife held a job? A. Yes.

"Q. Would they consider whether the striker had part-time work of his own? A. Yes.

"Q. Would they consider whether or not he was getting food stamps? A. Yes.

"Q. Would they consider whether or not he was getting [195] Unemployment checks? A. Yes.

"Q. All of these things would be considered which includes loans from friends, family, and banks? A. Yes, absolutely."

Page 46, line 5:

"Q. The local committee would make the initial determination of who gets and how much? A. Yes.

"Q. Do you know what type of proof of need an employer would have to show a local committee in order to get assistance? A. For example, on a car payment he would have to bring in the book. Before rent could be paid or a mortgage paid I believe an eviction notice was required. Medical payments it would be an actual bill from a doctor which could not be postponed. Wherever evidence could be expected to be furnished, it was."

Page 47, line 11:

"Q. Didn't the local community service committees also try, as part of their services, to steer the individual members to other sources of income other than the defense fund? For example, if they were eligible for food stamps they would tell them where to go? A. Yes, I assume so."

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[197] Page 52:

"Q. You indicated that there was some coordination between the AFL-CIO and the CWA with respect to food

stamps. Can you tell us what type of coordination? A. I am aware of one incident where members were complaining of red tape delay in not getting food stamps in certain parts of New York which I just do not remember. Mayes communicated this to Washington and there is a communication somewhere in one of the exhibits stating that discussions took place between our headquarters and the AFL-CIO. As a result of it, the United States Department of Agriculture moved in and assigned a person to see that the members got what they were entitled to.

"Q. Did the union also start various court actions with respect to food stamps and Welfare in New York? A. Yes.

"Q. Are you aware of any of these actions? A. Yes, I am aware of two such actions.

"Q. Could you describe the subject matter of the actions? A. Well, the union started one. The one the union started was in Suffolk County. It was a court suit against the Commissioner of Social Services in Suffolk County for [198] denial of food stamps and social service benefits to members who lived in Suffolk County. The other suit, much similar, was in the State Court in Onondaga County. It was either Commissioner Lascaris or the State who was the moving party. I just don't remember at the moment."

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[200] Page 60, line 12:

"Q. When was the first defense fund assistance given to employees in New York State during the 1971 strike? A. Shortly after August 26th.

"Q. And was food assistance given at that time? A. Yes.

"Q. Did it amount to approximately $30 per member?



A. I don't know. The only formula I remember was the $2 per day per member of the family.

"Q. Wasn't this food assistance cut off when unemployment insurance benefits were paid? A. Yes."

Page 61, line 13:

"Q. If members were not qualified for unemployment insurance, but qualified for other assistance, like welfare or food stamps, would their union food assistance also be cut off? A. There were no instructions from Mayes in that area. That would be a matter for the committee to make judgment as to the question of need.

"Q. But it was a uniform policy, that once you got unemployment insurance you no longer were able to get food assistance from the union? A. Yes.

[201] "Q. During the strike you testified that some employees, and you speculated possibly a thousand, might have collected welfare benefits from New York State, is that correct? A. Well, applied. Substantially less than that actually collected because of the suits. There is still a pending suit in Suffolk County for retroactive benefits.

"Q. But you don't know how many actually applied or how many collected, you are just guessing? A. That's right.

"Q. Do you know of any problem in collecting unemployment benefits from New York State during the strike? A. I don't know of any.

"Q. There was a problem on food stamps, is that correct? A. Yes.

"Q. And in that case the union enlisted the aid of the AFL-CIO Community Services Committee, is that correct? A. Yes."

Page 67, line—

"Q. Did the local unions in your district use telephone tape messages? A. Many, if not all of them, did.

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[203] "Q. Did they collect at some or all of these strikes welfare or food stamp benefits? A. I could respond as to New England, New Jersey. In that they were urged to do so.

"Q. Might they have collected in some of these other states? A. I would assume, if it is available, they would have collected it. Of course, the IBEW in particular, their strike fund gives a flat $25 a week, period.

"Q. It is not very much, is it? A. It is not very much at all, no."

Page 100, line 19:

"Q. By the way, the International did recommend approval of the settlement reached on July 18, 1971, is that correct? A. Yes.

"Q. And you felt it was a fair settlement? A. Yes."

Page 101, line 19:

"Q. Wasn't the stated purpose of the strike fund to allow the union to strengthen its position at the bargaining table and to have more effective strikes? A. Surely.

"Q. Well, how does it strengthen its position at the bar-[204] gaining table by having a strike fund? A. To take care of those necessities, to relieve the employee and his family of having these unnecessary worries. It is a morale factor.

"Q. Well, how does it affect the bargaining, the morale of the employees? A. The morale of the employees is a very viable and visible thing to the employer. You see, we



talk about negotiations in the Bell System. You can't just get away from it in this case. That was the tragic difficulty of this strike in that people were striking for things which were unattainable only because of the make-up of the Bell System. Even if the New York Telephone wanted to give it to them they couldn't.

"Q. But the ability to give strike funds to strikers does strengthen then the position of the union at the bargaining table, is that right? A. Yes.

"Q. Because it increases the morale of the employees? A. Yes.

"Q. By relieving them of certain financial hardships? A. Yes."

Page 103, line 10:

"Q. Didn't you state to the employees, after the strike [205] of 1971-1972, that one of the major factors in having the employees stay together and out for 228 days was the fact that you obtained benefits from the defense fund? A. Sure.

"Q. Isn't that another way of saying it made for a more effective strike? A. What it does is that in any large group of people there are the weak and the strong. What the existence of a defense fund does is eliminate the crutch that the weak employee may want to use as an excuse to return to work and generally he is the fellow who didn't want to go out at the outset, who followed the crowd."

Page 106, line 11:

"Q. Do you agree with the New York Times editorial and other comments that ultimately the settlement achieved in this strike, as far as the financial terms and so on, was not substantially better than the original offer? A. It

was not substantially better. I don't think there is any question about it when you measure the dollars and cents.

"Q. What was the difference in dollars? A. I will elaborate on it without too much delay. I think the major victory of this strike, which to some degree surprised me, [206] was that for the first time in the history of collective bargaining in the Bell System major items were changed of a Bell System nature, matters which could affect every employee in the Bell System.

"Q. Are you saying that they beat the pattern? A. I am talking about principle.

"Q. Is that what you are saying, they did better than the pattern settlement? A. What surprised me is that on matters of principle which didn't in itself mean many dollars at this point the Bell System did bend."

Page 108, line 3:

"Q. But these were matters of national bargaining, they would be able to get changed? A. These would have been things negotiated at a national level.

"Q. Yet they were able to change it in one unit of the Bell System, which is the unusual thing? A. That's correct. . . ."

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[240] Testimony of JULES BACKMAN; Direct Examination by Mr. Benetar:

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Q. Dr. Backman, please state your occupation. A. I am a research professor emeritus at New York University and a consulting economist.

Q. What titles have you held at New York University? A. Well, the usual run through of titles. I reached the



range of full professor in 1950. I was made research professor in 1960 and became emeritus at the end of the academic year of 1975.

Q. Please summarize briefly your educational background. A. I hold four degrees from New York University, baccalaureate in 1931, cum laude, M.A. 1932, M.B.A. 1933, doctor of commercial science in 1935.

Q. What are your principal affiliations with professional associations? A. I am a member of the American Economist Association, the Industrial Labor Relations Association and the American Statistical Association to which I was elected as an honorary fellow.

[241] Q. Have you specialized in any particular area or areas of economics? A. Yes, sir, several areas: labor economics, prices, antitrust and business economics.

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[242] Q. Have you ever testified, Dr. Backman, before any Congressional committees? A. I have.

Q. At whose behest did you testify before those committees? A. Always at the request of the chairman of the committee.

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[243] Q. Have you conducted research in the field of economics? A. I have.

Q. Have you ever been retained by the Government or by private parties to conduct economic research, evaluate the results of that research, and draw conclusions or submit recommendations concerning it? A. Very many times.

Q. Could you identify or would you identify some of the parties for which you conducted economic research? A. I have conducted economic research for organizations such

as the Brookings Institution in Washington, the American Enterprise Association, the National Industrial Conference Board. I made a number of industry studies, sometimes at the request of companies, at other times at the request of trade associations.

They have covered industries like the chemical industries, the railroads, cotton textiles, newspaper industry, advertising, potash, and a number of others.

[244] Q. To what extent was this research, economic research, in the labor field? A. I made a number of studies in the labor field, including studies of wage behavior, multiemployer bargaining, productivity, wage control, employment and unemployment, and, in addition to the studies that dealt directly with those subjects, in most of my industry studies there are chapters that deal with labor matters.

Usually there is a chapter on wages and fringe benefits and a chapter on productivity in the industry.

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Q. As a result of your research and analysis, did you [245] form an opinion as to whether the availability or payment of unemployment insurance to strikers in New York State has a significant impact on collective bargaining?

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[246] A. In my opinion, it does.

Q. Would you tell the Court in what respects, please, you found this impact to exert itself? A. The payment of unemployment insurance has an impact on the attitudes and positions of both parties in the collective bargaining negotiations.

On the management side, management perceives that down the road, in eight weeks, the position of employees will be strengthened by the receipt of sums of money which



cover most or all of their basic living costs, their essential living costs and it recognizes that this strengthens the ability of workers to hold out.

Management contends that as unemployment payments are made its position in the unemployment insurance fund is affected and therefore it may be subject to additional taxes because of the drain on the fund. This would be particularly true whereas a result of the operation of experience rating they were paying less than whatever the maximum rate may be.

On the employees and the union's side, it has a double impact. First, it affects the position of the union in that it reduces the drain on such strike funds as it has built up for the purposes of the particular strike, if it took place; [247] secondly, it improves the economic position of the worker and makes it possible for him to hold out. It increases his staying power for a longer period of time. In my judgment, this must affect the bargaining stance of both parties and, hence, affects collective bargaining.

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[250] A. Broadly speaking, the ability of workers to hold out in a strike situation depends upon the amount of liquid assets and the resources to which they have access, and the amount of resources that they may require will be determined by what we may characterize as the minimum essential spending, expenditures.

In other words, there are some types of expenditures that can be postponed, buying new furniture, carpeting, [251] or a new car, or items of that kind. They are postponable. There are other types of expenditures which are not postponable.

Q. Are you in a position to illustrate the points you have just made based on any of the literature in the field? A. Yes. There is ample literature that indicates that workers as well as people of moderate circumstances generally have very limited amounts of liquid assets.

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[254] A. . . . At page 103 of the 1969 Survey of Consumer Finances of the University of Michigan there appears a table, titled 66.

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This suggests that workers have a minimum amount of liquid assets that can be used to meet their on-going needs during a period of strike.

The Federal Reserve Bulletin for January, 1967, Exhibit 397, is a little more specific because at page 45 it shows [255] at the bottom of the page the employment status of the head of the household and the second category is "Employed by others," which, of course, would be the workers.

At about the middle of the table it shows all liquid assets of those who are listed as being employed in the year 1963, and the average at that time was $231. By any standards, the totals that are shown by both of these studies are relatively small and would not permit workers to be able to meet their ongoing needs for any period of time that is really of any importance.

Q. You have referred to tables published in 1969. Were there any comparable tables published as of a later date? A. To the best of our knowledge—and we attempted to find them—these were the latest figures. But that does not affect the—my conviction as to the significance of these



liquid assets, nor does it affect the numbers, because this historically has been the situation.

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[266] Q. What did you find in your research concerning the second factor, namely, the minimum needs for living expenses of workers? A. I examined the consumer price index, which is built around a study of workers' expenditures, and is prepared by the U.S. Department of Labor, U.S. Bureau of Labor Statistics.

In one of their publications titled Relative Importance of Components in the Consumer Price Index, December, 1974—

Q. Will you hold that just a moment, please.

Mr. Benetar: I would like to have marked for identification the portion of this document the witness is referring to and have it marked as Exhibit 399.

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[267] Q. Go ahead, Doctor. A. This publication shows the percentage of the workers' expenditures which was spent for various items. For example, food at home is shown as 19.657 per cent of his total expenditures.

I should say by way of prefatory comment that the budget does not include any income taxes. It does not include Federal, State or local income taxes, so that this is really a percentage of what he spent of what may be called his take-home pay after taxes.

I have examined the components and concluded that items such as food at home, shelter, gas and electricity, telephone, water, sewer, gasoline and motor oil, auto insurance rates, auto financing charges, local transit fares, drug and prescriptions, general physician office visits, newspapers and

cigarettes, are all part of what would generally be considered as absolutely essential expenditures.

I realize, of course, that there are ways of changing the food budget in times of need so that less could be spent than shown.

On the other hand, I didn't have a full measure of some types of continuing obligations like insurance, so that I [268] think the omissions and exclusions, for all practical purposes, would tend to cancel out.

In any event, these items account for 55 per cent of the budget. And so, to allow for questioned other items that might be included for one reason or another, I have reached the conclusion that about 60 per cent of the budget represents essential expenditures, which must be made in one way or another.

[269] The Court: Doctor, what you are saying is that if a person is operating on a take-home of 100 a week, in your judgment $60 of that is an irreducible minimum, by and large?

The Witness: By and large, yes, sir.

The Court: And the other 40 could, if necessary, be cut in times of a strike or otherwise?

The Witness: That's right. In fact, if the strike was relatively short, some of these payments, like the payments on car loans would be less important, they may not catch the date, but I put those in because it seemed to me there was no way I could determine whether or not it would be caught in that particular week.

On the other hand, when you come to items like durable goods or semi-durable goods, purchases can be postponed.



I am not saying that is always the most desirable situation, but it can be done.

There is recognition of that factor and of these numbers of about 55, 60 per cent in the literature. I think at a later point in my testimony I will cite in another context some of the data which show this is pretty widely regarded as the number that would be used.

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[272] By Mr. Benetar:

Q. Dr. Backman, did you draw any conclusions as to the impact of the economic factors you have just been discussing on the duration of strikes or the length of strikes? A. On the basis of these data, it seems clear to me that when a strike approaches or reaches the eighth week in New York, the ability of strikers to hold out is significantly increased if the resources made available to them through unemployment insurance is close to or approximates what [273] would be the minimum essential expenditures they would require.

It would seem to me that the ability to stand firm in terms of what a group of workers or a union was demanding is changed very dramatically when these funds become available.

Q. In your opinion, do unemployment insurance benefit payments in New York State cover the essential expenditures of workers as you have been describing it? A. Well, under the New York State law the worker is entitled to 50 per cent of his wage—not take-home pay, but whatever the contract earnings may be, which is before deduction of taxes. He is entitled to a maximum currently of $95.

On its face this would make it seem as though every worker earning up to and including $190 would be getting 50 per cent of his earnings. In fact, a worker, a married worker with two children who earns $190 would have to pay Social Security taxes of a little more than $11, Federal income taxes of about $17 and State taxes of about $3, assuming standard deductions.

So that he actually takes home something like $159. If he receives $95 on the basis of the 190 and his take-home pay was 159, he is then receiving about 60 per cent of his take-home pay. I made the calculations to see at what [274] point his take-home pay would be $190 so that he would be at the 50 per cent mark in terms of the equivalent take-home pay and that works out to about $230 a week.

In other words, workers earning up to $230 a week re-receive 50 per cent or more of their take-home pay in unemployment insurance.

Now, this understates the actual percentage of take-home pay because there is no allowance and deductions for union dues, no deduction or allowance in the event there is either an insurance or pension plan to which the employee contributes, no allowance made for trip costs to and from the job or such expenditures that may be involved for food.

So I think it, if anything, is a very conservative estimate of the percentage of his take-home pay which he would obtain.

If he gets 50 to 60 per cent of his take-home pay, and probably a little higher, and his essential expenditures are in the general neighborhood of 60 per cent, then it seems to me that either in its entirety, or very substantially, his essential expenditures are covered. I made no allowance for any other sources of income.



Q. What did your research reveal as pertinent to this [275] subject? A. There is some other interesting research that has been conducted by economists over the last few years. It has a very esoteric title "The Disincentives That Are Created by Unemployment Insurance." While these studies no not deal with strike situations, they deal with the ability of workers receiving unemployment insurance to hold out longer when he has been involuntarily unemployed in his efforts to obtain a job.

In other words, they indicate that, in effect, the degree of pressure, economic pressure, on him to find a job—I find there is a very direct analogy to the ability of workers to stay out and, if I may, in the economic report of the President for January 1976 they have a discussion of unemployment compensation and as part of that discussion it deals with this question of disincentives, and I quote from page 110 of this report, which is the official report issued from Washington:

"For most persons, however, the income support provided by the unemployment compensation system is a means of financing the search for a job. For these persons, if a longer period of unemployment facilitates job search and leads to a job with higher wages and better fringe benefits, more pleasant working conditions or a longer expected job tenure, it may represent a worthwhile investment." And [276] then from another paragraph:

"Partly because of the unemployment compensation benefits, workers would be less likely to seek other jobs during these periods of unemployment particularly if unemployment is widespread."

In other words, they recognize the typical situation and also the situation during a period such as the present time when a large-scale unemployment takes place.

Among the well-known economists—

The Court: What you are saying, Doctor, is that substantial compensation, according to some statistics, results in a person not really getting out and hustling for a new job, sort of taking a ride on that compensation for a while in a non-strike layoff situation and from that one could conclude that, a fortiori, if it has a non-incentive back-to-work basis in a normal layoff, it has the same or greater effect where the employee has willingly abandoned the work.

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[279] The Witness: . . . It seems to me that these studies, and there have been many others, all point to the same conclusion, and that is that if the magnitude of unemployment insurance is such that it permits a worker to hold [280] out before he takes a new job, where he is involuntarily unemployed, it must certainly have a similar effect where a worker is on strike. The relationship between needs and income is really the same kind of relationship in both cases.

Q. Doctor, did your research disclose any expression by unions which recognized the economic problem faced by their members in strike situations and what they do about it? A. Yes, sir, it did.

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[285] The Court: Let me ask the next question: How many such statements did you or do you have before you in arriving at the conclusion that you are about to express based upon an understanding of the union's position in this regard, 1, 2, 10, 15?

The Witness: I had planned to only cite three or four, but I have looked at dozens and dozens of these statements.

The Court: What is the general thrust of these statements?

The Witness: The general thrust of these statements, number one, unions in their preparations for strikes to an increasing degree, in fact pretty widespread today, seek all the information they can get, make all the plans that can be made to determine what sources of income will be available to striking workers during such a strike.

Secondly, they prepare pamphlets, prepare leaflets to distribute to their workers, they hold meetings, to alert them to the fact that these sources are available.

Thirdly, they use, in connection with welfare, people who [286] have been working on community funds and have the relationships to determine the proper mechanics, the way that one would follow in order to obtain this.

Fourth, they very often arrange for registration for some of these purposes to take place not in the Government agency's offices but at a union hall or some other convenient place, and that is not unique to strikes, it is done in other cases too, but they go through all of the preparation.

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[287] The Court: All he is telling me, and I don't want to spend a lot of time on it, that on the basis of this information he can reach a conclusion that unions look to every source of money available and take it into account in their plans and advise their members as to where it is available to them as part of their plans.

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[288] Q. Did you form any judgment as to whether the [289] unions take unemployment insurance into account in their collective bargaining strategy? A. Yes, sir, I did.

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Q. Would you refer to any particular item which you believe supports that conclusion? A. Well, I am not sure what I am supposed to refer to at this moment. I have seen reports in a variety of sources, of the GE strike, in which one local of a union stated specifically that—the New York local, Schenectady local, did not settle because they had unemployment insurance and that would seem to me to be a very specific idea of its effect upon strategy.

There are other areas where the payment of unemployment insurance has permitted the reduction of strike benefits by the union and this would seem to me to be illustrative of this kind of impact.

In the lists of items to which unions refer as having great significance, there is unemployment insurance—the classic case is General Motors, where they called out the tool [290] and die workers so that others would become eligible for strikes because they were involuntarily unemployed because the plants shut down, and with the tool and die workers out on the production workers couldn't work—



Q. You mean they became eligible for unemployment insurance? A. Yes.

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[291] Q. Did you observe any statements concerning unemployment insurance in connection with the Telephone Company strike by the union? A. Yes. There were a number of statements that are included in this record, if I can spot them, in which were detailed, as I recall, the number of days before unemployment would be available. In several of these documents they indicated the relationship between strike assistance and unemployment insurance and indicated that in the first week of unemployment insurance they wouldn't be getting their full amount and therefore they would be entitled to some of the food assistance and other types of strike assistance which the union was making available through its strike fund or its defense fund—

Q. You mean the strike fund allowance would be reduced when the unemployment insurance began to be paid? A. [292] That's right, they stated that specifically.

Q. Were there any statements made at the end of the strike about the impact of unemployment insurance that you took into account in your research? A. There was one summary statement—I don't have the exhibit number before me, but I believe it appeared in March 1973—in which the union in accounting—

Q. 1972. A. '72. In which the union in describing its relative success made reference to the unemployment insurance as an important factor.

Q. I call your attention to Exhibit 217 . . . .

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Did you observe any comment there pertinent to your inquiry? A. Well, the Wall Street Journal periodically makes what they call roundups of opinion, and this was such a roundup in which they quoted a number of labor leaders, indicating that labor leaders don't deny that welfare benefits make surviving a strike easier.

They call attention to Mr. Perlis, who argues that strikers should receive public aid if they don't meet the eligi-
[293] bility requirements, but if they qualify they shouldn't be discriminated against while on strike.

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[298] Q. Do you have an opinion as to whether the existence, availability and payment of Unemployment Insurance benefits have an impact on collective bargaining and the duration of strikes? A. I do.

Q. Do you have an opinion as to whether unions take into account the existence and availability of these Unemployment Insurance funds in planning their strike strategy? A. I do.

Q. In your opinion, does the availability and payment of these public funds of Unemployment Insurance have a bearing on the duration of strikes? A. It does.

Q. In what way? A. Well, there are several ways in which it affects tthe duration of strikes. Paradoxically, it affects it in opposite directions in some circumstances. Under some conditions the perception that the staying power of the union will be increased, the fact that the costs of Unemployment Compensation taxes would go up, factors of
[299] this kind, may induce, and I think does induce, some employers to settle earlier because they get concerned by what happens if they move past the eight-week period.



And so to this extent it can increase somewhat the earlier settlements.

As we pass over the eight-week barrier, the position, I think, becomes dramatically one-sided. The employee now has funds which are adequate or almost adequate to enable him to continue to get along. His staying power has increased very substantially.

The pressure he places on the union leaders becomes significantly reduced because of this factor. The willingness to make concessions is reduced because the pressure—after all, what is a strike? The strike is an instrumentality which creates pressures on both sides, and it is these pressures which ultimately lead to a settlement.

The employer, on the other hand, now sees the workers in effect being financed directly or indirectly out of the taxes which he has paid in, his Unemployment Insurance taxes; he sees a growing ability to hold out. He finds himself in a position where, unless he is ready to capitulate in some form, the strike will last longer.

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[302] Q. . . . [I]n your study of this subject did you
[303] find or come to any conclusions as to whether others than unions see the existence of Unemployment Insurance as a factor in the economic struggles that are represented by strikes? A. Well, both employers see it that way, and outside observers, that is, those that are not connected with either group, they are called neutrals, and I think that was the term used, have indicated in published documents of one form or another that they, too, see this as an important factor.

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[308] Q. From your familiarity with the field and in your opinion, do strike funds contribute to a union's strength in strike situations? A. They do.

Q. This may seem self-evident, but what is the purpose of a strike fund? A. It is to alleviate hardship that may be experienced by members of the union and the extent to which that hardship is alleviated varies very widely. I think I indicated earlier that the printers' unions are among the most generous in terms of strike funds they pay. In most of the other unions, the amounts are more nominal and very often are available to meet emergency needs.

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[309] Q. Did you find or do you find any relationship between Unemployment Insurance benefits and union strike funds? A. There have been situations where such a relationship did develop. For example, I ran across illustrations of strike benefits that were discontinued because Un-
[310] employment Insurance was received, so that the available strike funds could be used in other states. I found situations in New York where the strike funds were added to Unemployment Insurance, thus taking the total amounts received by workers far beyond the basic essentials and, in some instances, taking it up to practically their entire prestrike wage. There are relationships of this type which appear in various studies that I have examined.

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[315] Q. Did your research disclose any expressions by unions of their views concerning the benefits as a factor in strengthening the strikers' position and a contributing factor to lengthening the duration of strikes, referring



to Unemployment Insurance benefits? A. I have run across statements by union leaders to that effect.

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[316] Q. Did you find any expression of employers' views on the availability of Unemployment Insurance benefits as a factor in strengthening the strikers' position and a contributing factor to lengthening the duration of strikers? A. Yes, sir, I did.

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[325] Q. Dr. Backman, were you asked by me to review the union communications arising out of the 1971-72 CWA strike against New York Telephone Company, which were marked as exhibits in this case. A. I was.

Q. Did you form any opinion as to the significance of their content in its relationship to the opinions you have expressed here today? A. Well, they supported, I think, completely the opinions that I have expressed.

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The Court: . . . Doctor, you are saying that reviewing the union documents, they supported which opinions, that they took the unemployment into consideration as a factor in the duration of the strike? Is that what you are saying?

The Witness: Yes, sir.

[326] The Court: Did they support any other specific opinions?

The Witness: Well, also in connection with its importance in collective bargaining and the relationship between unemployment insurance and other sources of income where

they referred to food assistance, for example, being reduced when unemployment insurance was being paid.

The Court: I see. Okay.

Q. And also in relation to the strike fund? A. Yes, sir.

Q. Tell us about that. A. For example, in Exhibit 152 they refer to unemployment compensation as a tremendous assist to members and then refer to the CWA defense fund, which was taking care of necessary payments for shelter and installment, and they say that the defense funds were being used in strict accordance with the rules and regulations of the union.

Q. Did you find a reference to unemployment insurance payments resulting in a reduction of strike benefits from the strike fund?

Well, to move that along, did you see Exhibit 147 (handing)? A. Yes. This says that no food assistance is to be given after September 7, 1971, and that food assistance [327] was coming from the defense strike fund. I had mentioned that but didn't relate it to the defense strike fund.

Q. Was there a reference to the same subject in Exhibit 26? A. Exhibit 26 says specifically, "We remind you that members are eligible for emergency food assistance under the CWA defense fund until such time as they receive unemployment checks."

Q. And, finally, did you look at Exhibit 65? A. In Exhibit 65 it says, "Next week most members should receive a full check from New York State unemployment. Food assistance will be only paid to those members who show an unemployment check in a lesser amount than their normal food assistance entitlement. Absolute proof will be required for an assistance."



Q. Turning to another subject, did you discuss with the other two experts for the plaintiffs in this case, Dr. Glasser and Perl, studies which they had made pertinent to the questions under discussion? A. I did.

Q. And how if at all, did these studies affect your own opinion in this matter? A. I saw these studies, I guess, sometime in January, early February, after I had reached my own conclusions, and they confirmed them.

[328] Q. Have you formed any opinion concerning whether or not the availability or payment of unemployment insurance benefits to strikers in New York State has a substantial impact on the subjects of collective barganing and strike settlements in New York State? A. Yes, sir, I did.

Q. State your opinion, please. A. Employers seeing the availability of unemployment insurance down the road, recognizing that the striker—or even before the strike, that the worker, if he went on strike would in time be able to receive substantial support from these sources, for which he pays through the unemployment insurance tax, and also recognizing that if the strike went beyond the eight weeks his reserves in the unemployment insurance fund would be reduced and, hence, his cost for the unemployment insurance tax would go up, is encouraged, if that is the right word, to make more liberal settlement in order to avoid the situation where his own position would be relatively weaker than that of the union. This would encourage some of the shorter strikes to which I referred earlier, but the price would be paid for it in the form of a more liberal settlement.

Q. In summary, or in conclusion, Dr. Backman, in your [329] opinion, does the availability or payment of unemployment insurance benefits in New York exert a substan-

tial impact on strikers and collective bargaining here? A. It does.

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[330] Cross Examination by Mrs. Marcus:

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[366] Q. You testified that unemployment insurance in some cases lengthens and in some cases shortens strikes, is that correct? A. Yes, ma'am.

Q. In the cases where strikes are shortened, what is the affect on the wage settlement on the supplementary benefits included in the settlement? A. I would think that in those cases a higher price had to be paid in order to abort the strike and therefore would act to increase the cost of settlements.

Q. In the cases where strikes are lengthened, what is the effect on the wage settlement and the supplementary benefits included in the settlement? A. I would think it would also increase the cost because the relative position of the union and the workers is considerably strengthened and in the usual interplay in collective bargaining this would suggest a more liberal settlement at a higher cost.

[367] Q. So then, Doctor, your conclusion is that whether UI has increased or decreased the length of strikes, wage settlements on the average will increase? A. I would think they would, yes.

Q. Do you have any data which shows that union wage rates increased more rapidly in New York State than in states without unemployment insurance? A. I don't have any such data and if there were any aggregate data available, they would be meaningless.

Q. You have no such data. To summarize again your testimony, you testified that UI increases the length of



work stoppages in some cases, decreases it in other cases, but in both a higher wage settlement would generally result? A. That's right.

Q. I show you the study by Dr. Perl which you said you reviewed and which you said supports your conclusions. Will you tell us for which industries did Dr. Perl find a statistically significant difference in strike lengths in New York and Rhode Island as opposed to other states? In which industries did he find that?

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[370] Q. I am talking about statistical significance at the 5 per cent level. A. What I find in these states it is 22 weeks and in other states it is 14 weeks, and I am looking now at public services, and that seems to me to be statistically significant.

Q. Did you look in his column where he has calculated the statistical significance? A. What he has done, he has set up a T statistic—

Q. Do you know what that is, Doctor? A. Well, in a general way. I do not pretend any special technical handling of these statistics—

Q. Let's take the non-electrical machinery. Do you have any data showing what wages in general—do you have any data showing that union wage rates increased more rapidly in that industry in New York and Rhode Island than elsewhere? A. There are no such data available.

Q. You have no data showing that wages in general, union or non-union, increased more rapidly in these industries in New York and Rhode Island than elsewhere? A. There are no meaningful data available.

[371] Q. I am going to show you the United States Department of Labor's handbook of labor statistics for 1975

and we are going to look at wage data for the non-electrical machinery industry . . . .

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In other words, for one of the three industries which was found in the Perl study to be statistically significant the available data shows that the straight time hourly earnings rose more slowly in New York State than in all cities from the period of 1945 to 1973.

My first question is, why did you say there was no available wage data, and my second question is, how does this affect your theory, the fact that hourly wage earnings in that industry rose more slowly than in all cities?

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[372] A. Your question did not ask me about the difference in straight time earnings, you asked me about difference in union wages in these different cities. That is number one. I said there were no figures like that available and I still say so. As far as these figures are concerned, the electrical machinery industry is an industry which is a mixed bag as far as unionization is concerned.

Some of the big companies are highly unionized, like General Electric, Westinghouse, and many other companies are not. These figures which purport to show the percentage wage increase are affected by some other factors which you did not mention in your question. All wages in New York, which has been a lagging area in the economy, have been affected vis-a-vis the the national averages.

You could take in this volume and look at the figures for the whole state and you will find they have lagged behind the economy. That doesn't mean that wages would not have been even further lagged in the absence of the developments to which I am referring, but New York State, New York City, which used to run above the average now [373] run below the average and that is a reflection of all these numbers.



I am assuming the calculations you made were right, they looked about right, and it is about what I would expect in other industries in New York and what I have found in other industries in New York. But this doesn't tell us anything about anything other than the fact that in that industry it lagged. It doesn't tell us what happened in strike situations, because this covers a whole lot more than strike situations. It covers the average for everything.

Q. Don't union wages affect the average? A. Union wages affect the average—

Q. How? A. They affect it by being one of the components in the average and to the extent that other non-union companies follow after a fashion, not necessarily directly, the increases can be greater or less. I would expect in the non-electrical machinery industry, which includes General Electric, which has a major presence, and, hence, is highly unionized, that you could have a lower increase for the union than for the non-union and, in fact, one of the reasons why the wage price guidelines broke down in the middle 1960's is the non-union workers were getting larger [374] increases than the large companies because the large companies, with a high degree of public visibility were following pretty closely the wage guidelines whereas others were not.

These figures cannot be used to answer the question you asked.

[375] Q. In other words, the union wages effect the average in what direction? A. They can effect it in either direction.

Q. They can pull it down? A. They can pull it down. They can push it up.

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[378] You will find that the CPI for New York from '47 to '74 increased 130.9 per cent and for all cities during that same time period 120.8 per cent. A. What years were those?

Q. This was for Buffalo, the data is from '64 to '74; for New York the data is '47 to '74. Therefore, although the consumer price index increased more in New York City and Buffalo than elsewhere, the straight hourly wage rate in non-electrical machinery increased less rapidly in New York City and Buffalo than in the all cities index; is that correct? A. The CPI, yes.

Q. Yes? A. Yes, it increased somewhat less rapidly.

Q. You testified that in those cases in which UI has caused shorter strikes it results in higher wage settlements? A. When I say higher wage settlements, I am including the whole package, of course.

Q. According to the Perl study there are 15 industries in which the mean length of stoppages are shorter in New [379] York and Rhode Island then elsewhere: metals, mineral mining, trucking, movies, schools, leather goods, other local government, printing, retail, air transportation, food, auto repairs, textiles, real estate, electrical machinery.



Have union wage rates increased faster in these industries in New York and Rhode Island than elsewhere? A. I haven't got the slightest idea.

Mr. Benetar: What?

The Witness: I have not got the slightest idea.

Q. Have wages in general increased faster in these industries in New York and Rhode Island than elsewhere? A. I think they have increased faster than in New York. I am not sure about Rhode Island.

Q. Where do you find that data? A. One can look at New York State published data for average hourly earnings.

Q. And you found that in the average hourly earnings? A. This is my recollection of the data.

Q. You recollect that it shows that it rose more rapidly? [380] A. In New York, no. Nationally.

Q. It rose more rapidly nationally or in New York? A. Nationally.

Q. In other words, it rose less rapidly in New York? A. I think that is the implication.

Q. I would like you to look in that same handbook at Table 97, page 236. We are going to look at the wage data for local transit in major New York State and Rhode Island cities.

You will find that the percentage increase in average union wage rates for '49 through '72 for local transit are as follows:

All cities, 250 per cent; Buffalo, 219.1; New York City, 292.2; Rochester, 248.9; Syracuse, 219.2; Providence, Rhode Island, 180 per cent.

So, in other words, of the major cities in New York State and Rhode Island only New York City had a higher percentage increase for this time period than the column headed "All Cities"—only New York in the transit area. A. Accepting your numbers.

Q. I will be happy to let you check them.

[381] Do you know that in New York State under the Taylor Law public employee strikes are prohibited and in fact penalized? A. They are supposed to be.

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You are also aware that Unemployment Insurance in New York is not given where a strike violates New York law; is that correct? A. I believe so.

Q. So that union wage rates, however, rose more rapidly in New York City in public transit than in all cities, despite the fact that those workers are not eligible for Unemployment Insurance? A. Between the dates that you selected.

Q. Would it surprise you to learn that—

Mr. Benetar: Excuse me. I think perhaps the Court may also take judicial notice—

The Court: Is this Mayor Lindsay's strike in the middle of these figures, Mayor Lindsay's transit strike?

Mr. Benetar: That is what I was going to say.

[382] The Court can take judicial notice that forbidden or not there have been plenty of strikes in the public employ.

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Q. Would it surprise you to learn that until 1970 local transit was privately owned in Buffalo, Rochester and Syracuse, and therefore strikers were eligible for Unemployment Insurance? A. No, it does not surprise me.

Q. But union wage rates rose more slowly in these cities than in all cities, as the figures that we have just gone over indicate? A. I thought I indicated that wages in New York had been lagging because of the lagging New York economy for the past two decades.

Q. Despite the help that this law would have given. But it is your speculation that they would have been even lower except for the law? A. I think they would have [383] lagged still more, that's right.

Q. But you have no data to support that? A. There are no data to support that.

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[390] Q. . . . [Y]ou testified before the wage stabilization board in a statement called Economic Position of the Steelworker, and you made the point quoting from current population reports, you made the point that:

"Many families have more than one wage earner or have some supplementary sources of income which are not easily ascertainable."

You cited marital and family characteristics of the labor force in the United States, March, 1950, current population reports labor force, Bureau of the Census.

Do you recall that testimony? A. Yes. And that's still true.

Q. And you concluded that "Approximately one-third of the households were estimated to have two or more persons in the labor force, and you said on the average there were

about 1.43 persons in the labor force per household, and applying this to steelworkers you said, if the average indicated above also applies to steelworkers, it seems clear that the average earnings of these families would exceed the BLS budget by a wide margin."

Do you think it is still true that that proportion of families have two or more persons in the labor force, that is, one-third of the households? A. I think that is probably [391] still true. I won't argue about a couple of percentage points either way.

Q. So that that would be another source of income? A. That could be a source of income.

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[391] Redirect Examination by Mr. Benetar:

Q. Dr. Backman, are there any characteristics of unemployment insurance benefits that are special to those benefits as distinguished from other public support? A. Well, the public support, welfare or food stamps or aid for dependent children, usually have some type of means test involved; that is, if you have more than a certain amount of assets, and they exclude from such assets ownership of a home, ownership of a car, if you have more than those assets you receive none of those benefits.

Unemployment insurance becomes, I guess you could say, a matter of right when the waiting period, whether it be for the involuntarily unemployed or the striker, is passed. In other words, when the one week goes by you are entitled to it, assuming you have met certain qualifications for work experience in the preceding period.

There is a second difference, and that is that management is alerted to the fact of unemployment insurance



[392] because before unemployment insurance is paid the agency checks with the company to make sure the individuals actually are employed. They must in effect certify to it.

So I think that's the difference. I think for many workers the unemployment insurance tends to be larger, although on the public support programs, if the worker has a large family, of course he can get more than the unemployment insurance. But except for those situations it would tend to be a larger item.

Until very recently, I guess there was another factor that played a role, there was a general stigma attached to taking welfare, food stamps. I don't think that is as much a factor today as it was maybe five, ten years ago, whereas unemployment insurance is in a different category in respect to that factor.

Q. You were asked some questions about the percentage of strikes in New York State lasting more than eight weeks. A. Yes, sir.

Q. Are you familiar with Exhibit 345? A. Yes, sir, I am.

Q. Would you tell the Court how the matter of length of strikes lasting more than eight weeks is reported by the Department of Labor of New York State? A. It is rather [393] interesting that the figure I used for 1970 is approximately the same as the figure that they cite for the average for 26 years. On page 18 it says, and I quote:

"About 9.8 per cent of all work stoppages during the 26 years from 1947 to 1972 lasted longer than eight weeks. The average covered 13.8 per cent of all workers and 51 per cent of the man days made idle."

Q. That last figure means that all the man days lost through strikes in New York State, 51.8 per cent were lost in strikes lasting more than eight weeks? A. That is 51.0 per cent.

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[429] Testimony of GERALD J. GLASSER; Cross Examination by Mrs. Marcus:

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[456] Q. You were the one who recommended that rather than studying people who had been on strike who had received unemployment insurance, you would take people in the general labor force? A. That's correct.

Q. And there was nothing in your experience which would have led you to believe that the questions which you asked, never mind the population for the moment—the questions which you asked would have been more salient and that the answers might have been different if you had picked a group who had actually been on strike or gotten unemployment insurance? A. Well, I gave some thought to that and I can give you some of the thinking that went into that. We thought not to do one at the exclusion of the other, or the other at the exclusion of the one, but to also entertain the idea of doing an experiential study and I must say that gave me difficult technical problems.

Number one, in terms of locating these people within the population that would be difficult to do a probability sample to detect people who had the experience Mrs. Marcus described.

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[460] Q. Your questionnaire did in fact make an attempt to ask a population which had been on strike— A. Correct.

Q. —these questions. And you said you abandoned that effort because with your random digit dialing method you



got only 25 persons who had actually been on strike, is that correct? A. Yes, I would have gotten only 25—I projected I would have gotten only about 25 by the time this study was done.

Q. How many in fact did you speak to from which you projected the 25? A. Eight.

Q. You spoke to eight and projected 25.

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[462] Q. The study was finished in September? A. The initial discussions, and this is from memory and I may be wrong, took place towards the end of 1974 and there were more discussions in the beginning of 1975, but it wasn't until July of 1975 that we actually went into the field and proceeded.

Q. You say it was finished in September 1975? A. I believe so, yes.

Q. Were there any strikes in New York which were taking place at the time that you either planned or executed this study? A. I do not know.

Q. Did you make any inquiry about it? A. No.

Q. Are you familiar with these publications of the New York State Department of Labor, as indicated on the cover, called "Labor News," and it is a regular publication of the department? A. I have never seen it before.

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Mrs. Marcus: I am reading from two things, "Labor [463] News Memorandum," volume XXXI, numbers 1 through 2, and this is dated January 14, 1976, but it is a regular series.

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Q. You will note that these bulletins contain the population and they also list the areas in which strikes are going on, how many workers are involved in these strikes—here is 4,770, 2,600, 1,170, and in this publication it tells the firm which is being struck and the date when the strike began, and so on.

This is publicly available information. So you made no attempt to inquire or look into such publications to determine whether a strike was taking place, how many people were involved in it or who was being struck? A. No.

Q. So you don't really have any scientific basis for coming to a conclusion about whether people who had previously been on strike and/or had previously received unemployment insurance during the strike would have agreed [464] or disagreed with the answers that you did get? A. Well, only based on the eight cases.

Q. Is that a statistically significant number, eight? A. No.

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[465] The Court: Does the fact that you don't have input from actual strikers, does that make your survey statistically unreliable? That is her question.

A. I don't think it makes it unreliable and inaccurate. It refers to different types of information. To the extent people who were interviewed, respondents among the 1200, some of them had strike experience and we don't know who they are but presumably they are in their proper proportion because we took a probability sampling.

To the extent attitudes are influenced by past experience, the information is experiential. They are in there in their "proper" proportion, that is to say, that we have people



who experienced strikes of eight weeks or longer in the survey in the proportion in which you would find them in the general population.

Q. In other words, the eight people, which you projected into 25 people? A. Yes.

Q. And that is because you took the labor force in general rather than taking a strike force? A. Yes. The thinking there was that it should be that kind of survey, a survey of the general population including not only people who had experienced strikes of eight weeks or longer but people [466] who for one reason or another may have been going on strikes that long but didn't because of the availability of unemployment insurance, or otherwise, and also to include people who may sometime in the future have that experience.

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[471] Q. You felt that questions about how strikers would react and vote could be validly asked of persons with no strike experience at all, but you skipped these people who had had it more than five years ago? A. That is correct. At one time we were asking about current attitudes, what are their attitudes and opinions as of today. In the other case we would be asking about their experience at some more or less remote point in the past.

Q. And their attitudes wouldn't be conditioned by those experiences? A. Might be. What is past is prologue.

Q. They would be less likely to have any attitudes than those with no strike experience at all? A. We included the attitudes and opinions of everyone in the labor force, those [472] that had strike experience five years ago, more, less, no strike experience. It was a general survey.

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[482] Q. Why did you use the words in that question on Table 2, "Enables strikers to hold out longer," which simply questions whether Unemployment Insurance is a resource [483] instead of directly asking a question that is, "Do employees strike longer if they receive Unemployment Insurance than they otherwise would?"? A. I guess the answer is I didn't think of it.

Q. In phrasing the question, why did you give only a part of the facts to the respondent rather than telling him $95 was a maximum and failing to disclose the minimum and leaving the respondent in this very brief telephone interview with the impression that perhaps all recipients received $95—

The Court: Does it make any difference why they did or didn't do something? Don't we have to deal with what they did?

Mrs. Marcus: That was a foundation for my next question.

Q. Do you think that the answers to the question would have been different if you had disclosed to them that there was a $95 maximum and that this would only go to people earning $190 or more per week? Do you think the answers would have been different had you given them that fact as well as the $95 fact which sticks in their mind in a very brief telephone interview? A. I honestly don't know, Mrs. Marcus.

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[487] Q. . . . Why did you phrase the question, that is, the questions repeated on these tables, so as to completely omit any self-help—which would you most likely seek, food stamps, your savings, help from relatives—why did you



omit self-help in that list of questions? A. In discussions with counsel, this seemed to be the sources of income they were interested in having information about.

Q. Why did you omit personal resources, like savings accounts? A. Same reason.

Q. And for the same reason you omitted other employment? A. Correct.

Q. And you, for the same reason, omitted the salaries of other working family members? A. Correct.

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[492] Q. All right. Since your questions on 8 through 10 convey a repetition of management's refusal to change its bargaining position over a two-month period, will the respondents' answers on tables 8 through 10 be at all influenced, in your opinion, by management's unchanged posture? A. This just refers to their answers to the simple situation that we put to them. It would be affected I'm sure by that, and maybe many other things, too.

Q. Doesn't the phrasing in terms of expected general behavior, instead of asking respondent what he would do, result in an answer which is removed from all the factors which exist in the real context? A. I don't know.

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[494] Testimony of HERMAN A. GRAY; Direct Examination by Mrs. Marcus:

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[496] A. . . . [I]n the fall of 1934 Governor Lehman appoint a tripartite committee to frame an unemployment act for the State of New York.

I was a member of that committee, and, as a matter of fact, was the sole draftsman of the New York State Unemployment Insurance Act.

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[508] Mrs. Marcus:

Q. Dr. Gray, did you have occasion to discuss during this period the State's interest in enacting this kind of statute? A. Of course. That was the whole purpose of the committee.

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The Witness: . . . May I also add that after the statute was enacted I was appointed by the Governor as a public representative of the advisory council, elected as Chairman [509] and I served for 14 years as an official, non-salaried, if you please, but nevertheless an important official associated with the administration of the Act.

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[512] The Court: What was the subject of discussion of the members of the committee on the State's interest in the proposed legislation?

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The Witness: We were confronted with major unemployment at that time. The period was 1934. There had been a great deal of propaganda going on throughout the country for an enactment of an Unemployment Insurance Act. As a matter of fact, the Federal law was then pending in Congress as well while we were discussing this Act. The Federal Social Security Act was under debate in Congress and it was for the purpose of dealing with the problem of unemployment via this mechanism of Unemployment Insurance that we met and it was a matter of vital concern to the people of the State.

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Q. What were the views of the employer members whom you have named with whom you consulted on the draft [513] provision?

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A. This particular employer group was committed, as we were, to the idea of setting up an Unemployment Insurance System, but when you get to dealing with the details of such a system there are a complex number of policy questions and, of course, each group, each individual, as a matter of fact, had his own view on some of these policy questions.

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[515] The Witness: The State had no position. We were appointed by the Governor to advise him and present legislation to him so that the Commissioner himself, who was the State, really, had no position.

The Court: Did your group in those discussions arrive at a suspension period of "seven consecutive weeks"?

The Witness: The original suspension was ten weeks. We arrived at that, yes.

The Court: What was the discussion and the reasons leading up to the arriving at a 10-week period?

The Witness: We started off with the very simple proposition that we are concerned with involuntary unemployment, and a man who is on strike cannot be said to be involuntarily unemployed. That very simple statement im- [516] mediately turned up, on looking at it, an enormous number of problems, because the union people immediately said, "Well, now, if you are going to deny benefits to a striker, what are you going to do to a man on lock-out? You can't say a man locked out is voluntarily unemployed."

Whereupon we largely, I might say myself, who is very much interested in the question of administration, raised

the question of who is going to determine the question and how do you determine the question. We were a group of rather practical people in the field of labor relations and we knew that it is sometimes impossible to know the difference between a strike and a lock-out. As arbitrator, I have been confronted again and again with problems where the employer comes in and says they struck and the union comes in and says no, it was a lock-out.

As a matter of fact, I recall as I talk to you now there was a case in Connecticut where in the middle of negotiations for a collective agreement the employer announced a unlateral decrease in wages and said, "As of Monday morning you have to come to work at these lower wages," and they walked out. The administrator of Unemployment Insurance said it was a lock-out and they would have to pay [517] benefits and the Court reversed the administrator and said no, it was a strike. Then along came the union people and said, "What if the strike is justified? Supposing the strike is in protest against a violation of law? Supposing the strike is because of a violation of an arbitrator's award?"

If you look at collective labor agreements, your Honor, you will find virtually all of them in the no-strike clause has a proviso that the no-strike clause is not to apply if the strike is because of a failure on the part of the employer to comply with an arbitrator's award.

All that meant was that some inexperienced clerk, who deals with Unemployment Insurance was going to be called upon to make an adjudication on very delicate and complex problems in labor relations. Neither side wanted that.

The employers backed away from that as the labor people backed away from it. But your problem doesn't end there,



your problem then goes on to the next and even more difficult question, what are you going to do about the people who are not involved in strike? If the lathe operators go out on strike, there is nothing, after a while, for the shipping clerks to do and you shut down the shipping depart-[518] ment. They had nothing to do with the strike, nothing to gain by the strike, so you would pay them, have to pay them as a matter of equity. If you start to do that, you open yourself up to the widest kind of manipulation. It is perfectly possible to pull one man out—on the West Coast, in California—

The Court: I understand.

The Witness: —they just pulled out the radio operator and the ships couldn't sail, but the real problem was with the crews, but the crews were not on strike and they were all paid.

Above all, we are concerned—you talk about the State interest, I myself, and in that respect the Industrial Commissioner was with me—we were concerned with a statute that could be administered effectively without too much bureaucracy. We knew that we were building a great bureaucratic machine and a complex one and we wanted to keep it down as much as we could. So everybody around the table backed away from the idea of having to determine these issues and that is how we came to this kind of statute which takes away all administrative adjudication. You don't try to determine why there is a labor dispute, whether it was strike, lock-out, justified, not justified; there is a labor dispute, period.

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[529] The Court: . . . I gather that the reason that strikers and those locked out are lumped together is that not that

they are necessarily identical, but that it would be just too difficult to administer this if you did not lump them together.

Am I right about that?

The Witness: Quite right.

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[541] Cross Examination by Mr. Benetar:

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[542] Q. Dr. Gray, you told us that it all started in a period of depression. A. Yes.

Q. Or low employment? A. That's right

Q. In about 1935? A. The agitation started long before that. As I said, Governor Roosevelt had already appointed a committee. That was the period of time, yes.

Q. And the idea was that there was a growing up-swell of feeling that there should be some reserves provided for [543] the voluntary unemployed, is that right? A. That's right.

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Q. I am sorry, I mean the involuntarily unemployed. A. I understood what you meant, yes.

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A. We were dealing with a method of financing the problem of unemployment.

Q. Involuntary unemployment? A. That's right.

Q. Do you recall writing an article in the New York University Law Review in 1935 when this legislation was either about to be or just had passed? A. I think I wrote that immediately after its enactment.

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[544] Q. Do you recall in that article saying, "In two cases, either where a job has been lost because of mis-



conduct in connection with the work or because of a strike, lock-out or other labor controversy, benefits will be paid only after a waiting period of ten weeks. There are some who would provide no benefits at all if the employment has ceased because of either of these two reasons."? A. That's right.

Q. And then you went on, "The danger of denying all benefits under such circumstance is obvious: It would tend to make employees subservient to their employers both be-[544] cause of the added disciplinary power it would give the latter and the check which it would put on strikes as a means for the improvement and protection of working conditions." Do you recall that? A. Yes. I still believe that.

Q. So that you felt, as this was written, that if the ten-week waiting period were eliminated and total disqualification followed for strikers, it would check them in their economic efforts to get improved working conditions? A. It would operate that way, yes.

Q. Do you recall also saying in the same article, "So in the case of a strike which is still being effectively conducted [545] after ten weeks (which would be unusual) the strikers would have to be available for work before they could claim benefits and they would have to accept jobs, if any were open. There is, therefore, little likelihood that the benefits would be used to finance a strike by maintaining the strikers in voluntary idleness." Do you remember saying that? A. I still believe that.

Q. In effect, you were telling your readership that there is no real fear that the payments of these benefits will help finance a strike or strikers in voluntary idleness because the number of strikes that are going to last that

long are really not— A. That was not the only "because." The other because is also important: Because they would have to search for work, they would have to leave the picket lines. A striker couldn't stand on a picket line and get unemployment insurance benefits, could he?

Q. But you referred in your sentence to this statement: "There is, therefore, little likelihood that the benefits"—you were talking about the payments there, weren't you? A. Yes.

Q. "—will be used to finance a strike by maintaining [546] the strikers in voluntary idleness"? A. Yes, that is still true.

Q. Did you become aware later that in fact strikes of this duration, or approximately this duration, were more numerous than you had anticipated? A. That is not the fact. I could not have become aware of something that is not the fact. The facts are to the contrary.

[546] Q. Do you recall that in 1946 you were the chairman of the New York State unemployment insurance advisory council? A. That's right.

Q. And you were a public member as well as chairman, were you not? A. The other way around: I was chairman because I was a public member.

Q. I will take it either way.

Do you recall that in one of your reports there was a section devoted to benefits during labor disputes in which you concurred, if you didn't write it, and six members of the advisory council, the three public and the three employer representatives, "Believe in principle that benefits should not be paid to strikers"—do you remember that? A. Yes.

[547] Q. "At present," you said, and this is as of 1946,



"benefits are paid after a seven-week suspension period." A. Right.

Q. Now, between that law review article and the time of this report the waiting period had been reduced from ten weeks, or nine weeks plus the customary week, to eight weeks— A. It depended on the standard waiting period. The seven weeks always remained seven. The lowering of the waiting period resulted from the lowering of the standard waiting period from three to one.

Q. The point of the matter is, regardless of how it happened, that when you wrote the first article there was a ten-week waiting period? A. That's right.

Q. And when you made this report it had been reduced to seven weeks? A. Right.

Q. Do you recall saying in this article, "When the law was amended in 1941 by reducing the suspension period from ten to seven weeks, it was argued that a shorter suspension period was warranted in view of the fact that the duration of strikes seldom, if ever, exceeded seven [548] weeks." Do you remember that? A. If it says so. I don't actually remember saying so, but if you are reading from something I said, well, of course I said it.

Q. So that at the time of the second article you were under the impression that there wouldn't be many strikes lasting more than seven weeks? A. I am still of that impression. I think the statistics will bear me out.

Q. Well, we will come to that.

"Recent experience," you said, "has demonstrated that many strikes have continued for periods beyond the seven weeks period." Do you remember that? A. Yes.

Q. Was that true and accurate, to the best of your knowledge, at the time you made the statement? A. Right. That was true in the immediate postwar period when there was a rash of strikes as wage controls disappeared, but that didn't last very long. The overall period of time, the overall statistical picture is such that the number of strikes which have lasted beyond seven weeks are infinitesimal.

Q. We will come to that. Let's stick to your report. [549] A. That's right.

Q. This report was to go to whom? A. This was a report that the advisory council was under a mandate to report to the Governor and the legislature annually and you are quoting from such a report.

Q. What was this intended to do, to influence legislative action? A. Not necessarily. It is hard to say. The legislature mandated a report and what I did with that report, when I was chairman, was to give it a character that could be used for research people as a continuing study of the operations of the unemployment insurance system, and that was the coloration I gave the report. What it is now, I don't know.

Q. Well, it, in any case, gave a true reflection of your state of mind and your state of knowledge at that time, is that right? A. Yes.

Q. "During 1946," you continued, "approximately $2.5 million in benefits was paid to about 51,000 persons unemployed because of strikes beyond the seven-week suspension period. In addition, about one-half million dollars was paid out under Section 600 to about 7,000 veterans." Do you recall that? A. I don't recall it, but you are



[550] reading from a document for which I am responsible, so obviously I must have said it.

Q. I want to go and see if you recall this: "The present provision of the law which permits the workers who voluntarily become unemployed because of a strike to receive benefits during the pendency of the strike runs counter to the objective of the law which 'compels our setting aside of financial reserves for the benefit of persons unemployed through no fault of their own.'" A. Yes, I said that.

Q. Did you believe it? A. I believe it now too.

Q. "It is also inconsistent with the policy laid down by the Congress in enacting the Federal servicemen's readjustment act, which expressly precludes the payment of readjustment allowances to veterans participating in a strike causing a work stoppage."

And now I would like to read you the last sentence of this paragraph: "Unemployment insurance benefits as such should not be used as an instrument for either party involved in a labor dispute." A. To what?

Q. Do you want me to repeat that? "Unemployment [551] insurance benefits as such should not be used as an instrument for either party involved in a labor dispute." A. Right.

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[554] Redirect Examination by Mrs. Marcus:

[556] A. . . . If you deny benefits to strikers—if there is anything in this business at all, and I discount this completely, really—if there is anything in this business, then you help the employer by denying benefits. So whatever

you do, you are in trouble. The whole difficulty here—basically I believe it runs counter to the principles of Unemployment Insurance. It has nothing to do with strikes, but the principle of Unemployment Insurance, to pay to a man who is voluntarily unemployed, but how do you avoid it—you can't avoid it without opening up a Pandora's Box and without creating problems in terms of State policy, which we better avoid, and that is why I voted with the rest of the committee for what is in the statute now.

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[562] The Court: You are saying that the denying of benefits would be a check on strikes. Would you amplify that you meant by that language, the denial of benefits puts a check on strikes?

The Witness: I am trying to think back as far as I can as to what I meant 40 years ago. It could only have been this: confronted with a loss of income you would have a check on strikes, and if there was a denial of benefits, the [563] check would be all the greater. . . .

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[568] The Court: Doctor, if you say that a denying of benefits is a check on strikes—

The Witness: That is what I said in 1935.

The Court: That means that it tends to restrict a strike.

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The Witness: Yes, of course.



[572] Testimony of MASON HAIRE; Direct Examination by MRS. MARCUS:

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[573] Q. Where are you employed? A. MIT, the Massachusetts Institute of Technology. MIT seems simpler.

Q. What is your title? A. I am a professor of psychology and organization behavior in our school of management.

Q. Can you give us a summary of your professional experience? A. I have taught at MIT now and before, I have taught at Harvard, I taught at Swarthmore College, I taught at the University of California in Berkeley in psychology and in industrial relations, usually jointly.

Q. Can you tell us in summary what you have published? A. I have published five books on psychological problems in industry and perhaps 100 articles, I'm not really sure of the number, but on that order, on related subjects.

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[574] A. I have been consultant to a good many companies and to branches of the United States Government, to other governments, to supranational organizations like ILO and UN branches and things of that sort, and two or three times to unions, much more often to companies than to unions.

Q. Have you been a consultant to any telephone companies? A. Yes. I have been a consultant to one or two or three operating companies, Pacific, I think New England Bell, but I can't be sure, and to the Bell Labs, the Bell Telephone Labs.

Q. Have you been a member or officer of any professional organization? A. Yes. I was, I think, regional

vice president of the Industrial Relations Research Association; fellow of the American Psychological Association.

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[576] Q. Now, does the assumption that man will always act in his own economic best interests, is that something that you deal with and is that something which meets empirical tests? A. It is something I deal with, certainly. It is something I have argued with my colleagues who are more pure economists. I have argued about that for 30 years, I guess.

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A. . . . There are in most cases of behavior in industry a variety of non-economic factors that influence the behavior.

Let me be clear about this because psychologists are often misunderstood. I do not mean that economic variables are of no importance but in most cases there are [577] a variety of non-economic variables that influence the behavior.

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[584] Q. Dr. Backman testified that management thinks that Unemployment Insurance strengthens the ability of workers to hold out in an industrial dispute.

Can you give us your opinion on that?

[585] A. My opinion would be that I would like to see behavioral data. I emphasized earlier that psychology is the study of behavior. I am not terribly moved by what somebody says he thinks a person's motivation was, and particularly when some hard data are available and could be available. I would like to see what the behavior was.

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[590] The Court: . . . Is that the kind of data that you might draw some inference from?

The Witness: That is the data—

The Court: A worker felt able to hold out in New York whereas he did not feel able to hold out in Ohio.

The Witness: This is some of the kind of data that I would want to consider, yes.

The Court: This kind of data, assuming my facts are correct, and that the vote was significantly different, that would be something that you might see certainly as a straw in the wind, to put it that way?

The Witness: Exactly.

The Court: As an industrial psychologist, and I assume psychology is psychology, regardless of its applications, there are certain essential principles that are applied in given situations, but if a person is on strike along with hundreds or thousands of others, and he is in the sixth week of a strike, for his weekly increase or fringe benefits, or what have you, if he is aware that he is going to get 50 per cent of his wages starting two weeks from now tax free, he has a different state of mind about hanging on then than if he has an absolutely blank future about when any money is coming in without going back to work; [591] isn't that essentially—that is psychologically valid, let me put it that way?

The Witness: I think that the fact that you state is no doubt true in many cases.

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[592] The Witness: . . . In cases where there is very great animosity on the part of the striking union, I can easily imagine a completely overriding—

The Court: Sure.

The Witness: That was all that I was going to illustrate.

The Court: What you are saying then is that in any strike there are factors and—

The Witness: A number of factors and the mix is different.

The Court: —and the mix is different.

If you have an animosity factor, or if you have a principle factor that is involved—and I use the word principle in the "p-l-e" sense—then that factor may be an overriding factor, economics be damned?

The Witness: Exactly.

The Court: I can certainly understand that as a psychological matter. But if you are solely in a wage increase factor, the workers want a wage increase, then I would think that psychologically it is valid that a person who knows that two weeks from today money is forthcoming [593] has a different attitude towards his present posture than somebody who sees no money down the pike unless he goes back to work.

The Witness: Yes. If you will excuse my quibbling one minute, when you speak of a strike in which the wage increase is the factor, I think very often the wage increase is a sanitary way to cover all of the factors; that is, it is a thing you can talk about.

Certainly we have a good deal of experience in related industrial situations that—to whatever extent antagonism exists between employer and employee, the more sanitary forms of the relationship, such as pay and things, are the things that get talked about, but are not necessarily the true motives.

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[595] A. If management thinks the payment of unemployment insurance will enable the workers to hold out longer, how would I assess that factor? Is that the question?

The Court: In their bargaining stance.

The Witness: If management is convinced that that is true, I think they might change their bargaining position. Whether or not it is true—I think it is characteristic of all of us, if we think something is true, we think there is a burglar under the bed.

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[596] A. I would not study only the statement of belief. The statement of belief comes from a variety of things; there are traditions, traditional ways of saying things and so on.

So I would certainly want to study the behavior of management. It might be a little hard to do, but yes, I would want to see the behavior.

Q. Which would be more significant in your view, the statement— A. The behavior, the behavior, without any question.

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[598] The Witness: . . . I don't say that money is of no important—it is.

On the other hand, in a variety of situations with complex motivational variables, I think other things might override the unemployment insurance as a factor in determining behavior in this kind of situation.

I hope that is responsive. I got somewhat mixed up about the question.

The Court: It is responsive. The problem with it is that you say something else might do something, and the

task that I have been given as the Court here is to determine whether or not this is a factor that improperly puts the state onto the scales in collective bargaining.

Therefore, whether, in any given instance some other factor might be more important is all well and good, if it is in fact present, but given the essence of what we have here, as I understand it, we have got to sort of take this in a vacuum, because only if we take it in a vacuum can we determine whether or not it is a factor, what weight it is given as a factor, how important it is as a factor; whether it is non-existent as a factor in some cases may depend upon, as I understand, other factors that may enter into it, but looking it square in the face, Doctor, if a [599] man is in the tenth week of a strike and for two weeks he has gotten half his pay and he knows he is going to get half his pay for another—what, 50 weeks, 48 weeks?

Mr. Benetar: 52.

The Court: Half pay for another 48 weeks, he feels a little different about things, right?

The Witness: Yes.

The Court: Without any question, I would think.

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[602] Mrs. Marcus: . . . Let's take management, or the claim that union representatives think that such and such is the effect of it.

I would like to know how he assesses that factor.

The Court: I think he answered that by saying if you think there is a burglar under the bed you are going to act in a particular way.



Mrs. Marcus: I think he also said that the behavior is what is most significant there rather than the—

The Court: I know, but the answer to your specific question is if you think there is a burglar under the bed you are going to call the police or jump out the window or something of that sort.

Mrs. Marcus: The question is do you call them? That is what I think he meant to point out.

The Court: Is the answer more involved than that? If management thinks it has an effect, then management is going to act as if it thinks it has an effect.

The Witness: That's correct. Whether it has an effect or not.

The Court: Whether it has an effect or not.

The Witness: Whether there is a burglar under the bed or not.

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[603] A. If I were charged somehow with determining the appropriateness of the New York State UI law, I would certainly want to study the behavior rather than the opinions.

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[604] The Court: Do you draw any conclusion, Doctor, from the fact that the union is advising its members of the availability of compensation as the time for it grows near, that it sets up machinery for the employees to get it, things of that kind? Do you draw any conclusions from that fact?

The Witness: The conclusion that I drew from reading [605] the whole bulk of that material was that it was not either an exhortation to do it, so the strike will work, or—and exalting "that we have it," but that it was providing

an administrative service, pointing out the existence of food stamps, welfare, maybe aid to dependent children, and UI; that it was more an administrative service to make sure that the things that are available were known to be available and how to do it rather than an exhortation to do it in order to consider the strike.

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[608] The Court: You would not expect there to be any reason for an announcement of the availability of compensation when the seventh week comes around and they are announcing a week from now it is available, you would not expect any sort of exaltant language in the announcement, would you?

The Witness: No. But I might have expected them to say, "Hold on boys because in another week we will get." [609] It is that kind of thing which I thought I conspicuously did not see.

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[622] Cross Examination by Mr. Benetar:

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[624] Q. There are three classes or levels of need. This was in your book "Psychology In Management." And you write them as (1) physical, such as food, water, sustenance, I suppose, tangible necessities; (2) social association with other people, affection and so forth; and (3) egoistic needs such as dominance, achievement and so forth.

Is that a pretty fair summary of your approach? A. Correct.

Q. And, of course, these levels of need exist in the context of the labor-management relationship as well as they do in the rest of real life? A. Correct.



Q. Now, you have also written that:

"Man does live by bread alone when there is no bread."

Do you recall that? A. I recall that.

Q. And where you see a worker or find a worker or observe a worker facing a strike, he is at that moment facing the possibility that his earnings are about to be cut off, [625] isn't that true? A. Right.

Q. And this means that unless he finds or has alternative means his bread will be threatened and if he is a family man the bread of his family as well? A. Right.

Q. Now, you have also observed in your book that this first level of need tends to crowd out the other levels where —perhaps I have an exact quotation. It is page 47.

> "However, if wages or the security of employment were threatened," you said, "the physical needs would quickly crowd to the head of the list in a position commensurate with their primary role in the human's make-up."

Is that a statement you still hold as a tenet in your psychological, scientific beliefs? A. Correct.

Q. Are you familiar enough with the labor-management scene to list for us the alternative financial resources or means that are available to a worker who is about to go on strike in the world as he sees it? A. When you speak of the labor-management scene, now you mean the broad scene, not just this specific case?

Q. The broad scene. A. Certainly one of the first is a [626] union's strike fund, often called a war chest. In different States there will be different laws with respect to

Welfare, aid to dependent children. Food stamps I guess are uniform. I am not positive of that. But food stamps and his own resources.

Let's see if I have made an exhaustive list. The war chest, aid to dependent children, Welfare, food stamps, his own resources and, where relevant, Unemployment Insurance. I don't guarantee that's exhaustive.

Q. Those are the ones that occur to you at the moment? A. Correct.

Q. And this worker, as he sees his world, about to go on strike, is going to lose his weekly earnings and he has these other places to draw from to meet his needs and those of his dependents, if he has any, right? A. Right.

Q. And his needs are going to play an important role in his thinking? A. Right.

Q. Now, do you believe that a worker in New York State who has been out of work for seven weeks on strike and he hasn't found alternate employment would be more or less likely to stay out longer if he knew that after eight [627] weeks he would get Unemployment Insurance?

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A. Depending on the reasons why he went on strike, that might or might not be a primary determinate.

Q. You said depending on the reasons why he went out. Where the issue is economic survival or livelihood at a level of maintenance no matter how average or how much pay may have dropped, haven't you said to us in effect that his primary need tends to crowd to the top of the list of needs? A. Yes, I have said it tends to.

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[630] The Court: Doctor, I am troubled by not getting what I feel is really a clearer answer on those two questions.

Let us assume that there is a worker who has had no income for seven weeks and he is married and he has two children, he is on strike with others for higher wages and higher fringe benefits. He is asked to continue the strike by the leaders.

His attitude toward continuing would be different, would it not, if he was aware that he would get half his income the following week from Compensation as opposed to a situation in which he would not get any income from any source of that kind in the future?

The Witness: I think so, your Honor.

The Court: Does that not tend to make him more receptive to a plea of the leaders to continue to strike?

The Witness: May I say, your Honor, that my answer that I think so is conditioned by your Honor's definition of the situation, particularly (a) that he has had no income for seven weeks and (b) that the strike was, in your hypo-[631] thetical case, purely an economic strike.

In those specific circumstances—

The Court: Let's suppose it wasn't an economic strike. What do you mean by a non-economic strike?

The Witness: A strike we spoke about earlier this morning where there might be great animosity or a matter of principle for which people would forego a certain amount. Now, if he had no income—

The Court: The principle being, for example, that a division was being transferred out of the State and they didn't want their neighbors to lose their jobs; are you talking about that kind of principle, is that it?

The Witness: There are a good many matters that you would call a matter of principle. A union shop might be a matter of principle in a particular negotiation.

The Court: Let's assume that. Let's assume a union shop. The worker would still tend to continue—it would be a factor in his tending to continue if he knew he was going to have half his income the following week is another principle? If he has a wife at home and two kids at home and they are down to the cheapest things she can get in a supermarket and they haven't driven their car and they haven't been to the movies, principle, economics or what-[632] ever the reason is, the fact that he is going to get half his income a week later makes him more amenable—Mr. Benetar's word was "tending to"—makes him more amenable to continuing the strike, isn't that so?

The Witness: I think that your Honor correctly said a person can be pushed far enough in the deprivation of physical sustenance so that that becomes almost completely overriding.

On the other hand, with some other support and very strong other needs it may not be. But in the kind of hypothetical case of which you speak he certainly can be pushed far enough. The man in the desert wants a glass of water long before he wants to be friendly with the first fellow he meets.

The Court: I wanted to be sure that given the cross-examination here, which I thought was a perfectly fair question, that we got an answer that squarely met him. I had a feeling we hadn't.

Now I gather that you would say that there is a tendency to make that worker more receptive to a plea to continue



to strike. That's all you are being asked to answer. I take it you would say there is such a tendency.

The Witness: There are conceivable circumstances under which that might be true, right. You were describing [633] hypothetical circumstances, your Honor, and asking me if it were true, and there are circumstances, yes.

The Court: For example, the hypothetical that I put to you is such a circumstance, I take it?

The Witness: Yes. The man hasn't had any salary for seven weeks and it is an economic strike.

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[634] Q. . . . If you were called in by a union and you were asked for some psychological guidance, perhaps in the area of communications to the union members, let's say, so as to maintain a strike and keep it solid, you know, stop any return-to-work movements, if you were called in in that situation, would you ask the union what resources their members could rely on in calling and maintaining the strike? A. I must say it wasn't the first thing I thought of doing, but it would probably be on the list. If I were trying to prolong the strike and advising the union, if I were a consultant, the first thing I would do would be to [635] explore the sources of group cohesion and the things that would tend to split the group off and then try to devise ways to hold them together, depending on what the situation was.

Q. I didn't ask you what the first thing was you would do. I didn't ask you that. A. I am sorry .

Q. I asked you whether you would inquire as to the sources of income of the workers, that is all I asked, but when you answer me that the first thing you would do

would be to examine into the sources of cohesion of the workers—is that your term? A. I think.

Q. —wouldn't that necessarily lead you into questions concerning what staying power they had economically? A. Yes, I think that would.

Q. And would you say, then, in all fairness, Dr. Haire, that if you were called in as a consultant, psychological consultant, in connection with a strike that was about to begin or had already been in progress, to advise them psychologically, among the sources of income that you would inquire about would be Unemployment Insurance, if it was [636] payable in that State? A. Yes, I think.

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[638] Q. The ascertainment of one's attitudes may be an index to his conduct or a guide, is that correct? A. Or a guide?

Q. Guide. A. Yes, it may be.

Q. And if you want to change his conduct, as I gather it from your book, one of the first things to do is to comprehend his attitude and if you want to change his conduct, to change his attitude; do I make myself plain? A. You make yourself plain, and there is no question but what in that book that was highly stressed.

Q. Do you mean by that remark that since you wrote the book you are questioning this? A. I only mean that since that time a good deal more work has come out which, quite interestingly, suggests the reverse course.

You are saying if you want to change the behavior, change the attitude. A good deal of work has come out that suggests if you want to change the attitude, change the behavior.



If I wrote that today, I might well modify the statement some, although I wouldn't deny the statement you have read.

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[649] Q. Let's go to 71, which I don't think is susceptible of this confusion.

This was issued on September the 3rd, or September 4, 1971—the 4th. Get the picture? This is shortly before the eight weeks period is about to expire. The union says to its members, "To all of you stalwarts who saw your duty and are doing it in the face of all the pressures, a ray of light has shown through. Members and non-members who have had the fortitude to stand their ground and who can hold their head high are now eligible for unemployment insurance."

The meaning of that was clear, wasn't it? A. Correct.

Q. And the union was saying to its members, "Those of you who held together . . ."—what was the word you used when you were describing what you were advised about, the cohesion— A. Cohesion.

Q. "Those of you who have been cohesive and stalwart, [650] you can hold your heads high because now you are eligible for unemployment insurance."

Would you consider that a statement of some significance, coming from the union to its members? A. I didn't read it, "You can hold your heads high because you are eligible for unemployment insurance"—

Q. It does not say that? A. I thought you said that.

Q. "And who can hold their head high, are now eligible for unemployment insurance." A. Yes.

Q. Did you consider that as significant, a significant statement by the union? A. I think that is not in the class that I was speaking of as administrative statements.

Q. Could we get to the affirmative rather than to the negative? Did you consider— A. Yes.

Q. Did you consider this a significant statement? A. Yes.

Q. And did you consider it a significant indication of the union's attitude that they saw a direct nexus between cohesion of their members on strike and unemployment insurance? A. I considered that as an item in weighing that [651] issue, yes.

Q. In the Rochester strike, I think you said you didn't see that, that 328 bulletin. A. I did not.

Q. There is a statement in here, "The company might want to spoil our Christmas but the members of Local 1170 CWA will march ten feet tall right through the holiday season and into unemployment insurance."

Now, here is another—

Mrs. Marcus: Can the witness see the whole document? I think the context is important.

A. I have seen it.

Mr. Benetar: I show it to him. If he wants it again, by all means.

Q. Do you see in here an attitude by the union of attaching importance to unemployment insurance in connection with their strike situation? A. Yes.

Q. Do you also begin to perceive from these statements not only that the union has an attitude but that they are seeking to influence their members' attitudes? A. I think these statements are examples of attempts to influence member's attitudes, yes.



[652] Q. To the belief that unemployment insurance will cushion the bumps in the road that will arise from a continued strike, if I can use that expression? A. Right.

Q. Is that correct? A. Correct. That is their thrust.

Q. Yes. Now, in Exhibit 165, I wonder if this is the editorial that you were talking about (handing to witness). A. Yes. This is the editorial that I was referring to.

Q. This came from a publication of the union, did you realize that? A. The Generator, yes.

Q. Did you take note of the statement that "New York Telephone would do well to pay the fund what it owes and commence preparations for our next contract, and, incidentally, better wages and benefits, instead of looking for ways to sabotage our strike weapon before we utilize it." A. I did.

Q. Did you notice that? A. Yes. That's why I referred to that editorial, but couldn't place it.

[653] Q. That was hardly an administrative guide. A. That's correct.

Q. That was—

The Court: Can I see that?

Q. That was an expression of the union's attitude that unemployment insurance is their strike weapon, isn't that right? A. That's what that editorial says, correct.

Q. Did you consider that a significant statement? A. Yes, I think that is a significant statement.

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Q. Are you beginning to perceive that there were more than two administrative guideline type of communications that were issued during the strike? A. More than two administrative guidelines?

Q. Type of communications that were issued during the strike.

Are you beginning to perceive that there were more than two that you mentioned? A. More than two what?

[654] Q. Communications that you lumped together as mere administrative guides. A. Could I be clear? I said I thought the big bulk were administrative guides. I mentioned a couple which I thought were not administrative. Let's you and I be clear about where the negative goes.

Q. You mentioned two. A. Right, which were not administrative.

Q. Are you beginning to perceive that there were more than two? A. Correct. The big bulk is on the other side.

Q. Did that cause you to discount the importance of the ones that I have been showing you, which you said you read? A. Not to discount the importance, but to take the whole proof as a whole, I think.

Q. If there was one document which called the unemployment insurance a strike weapon, did you feel that 100 tapes telling people where they could collect money wiped out the significance of the one that called it a strike weapon? A. I think they avoided an opportunity to emphasize that, if that was the point they wanted to emphasize, so that I guess I did discount it then because of the preponderance [655] on the other side. . . .

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[656] Q. In studying the papers in a case like this before coming to trial, did you accept his statement or did you apply a discount to it? A. I took the bulk of all the papers, as I have said before, that I have read, and I didn't really tabulate, but I had a kind of a rough assessment of how often this kind of point that you have just been reading was pushed and how often it was not in situations where it could very well have been.



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[689] WILLIAM H. MELODY, called as a witness after having been first duly sworn, testified as follows:

Direct Examination by Mrs. Marcus:

Q. Dr. Melody, where are you employed? A. I'm employed at the Annenburg School of Communications at the University of Pennsylvania, where I am associate professor of communications economics.

Q. Can you describe your work? A. I direct a graduate program of teaching and research in the areas of communications economics, Government regulation and public policy.

Q. What is your educational background? A. I have a bachelor of science, master of arts and PhD degrees; my [690] PhD is in economics.

Q. Can you summarize your professional experience? A. I have taught in the department of industrial administration at Iowa State University from 1963 to 1966; from 1966 until 1970 I was a senior economist at the Federal Communications Commission at Washington and—

Mr. Benetar: Which commission?

The Witness: Federal Communications Commission.

A. And from 1971 until the present time I have been at the University of Pennsylvania.

Q. What was the nature of your duties at the Federal Communications Commission? A. I performed in various capacities as an economist examining a number of regulatory problems dealing primarily with a wide range of

economic questions, including those emphasizing costing and pricing, in particular.

Q. Have you testified as a staff economist? A. Yes, I did, when I was at the Federal Communications Commission.

Q. In regard to what kind of policies? A. With regard to appropriate costing and pricing policies, in particular, for regulating telephone companies and particularly the American Telephone & Telegraph Company.

Q. Have you been a consultant to any organizations? [691] A. Yes. I have been a consultant to many organizations, mostly regulatory commissions: The Federal Communications Commission and state regulatory commissions. Also, I have been a consultant to corporations and other entities as well.

Q. Which corporations have you been a consultant to? A. I have been consultant with Communications Satellite Corporation, with the Data Transmission Company, Microwave Communications, Inc., Western Tele Communications and I am sure there are some others.

Q. Have you been a consultant to a union? A. No, I have not.

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[692] Q. What have you published? A. I am author, co-author or co-editor of several books and monographs as well as a multitude of articles.

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[705] Q. Examining the data on wages saved during the strike, which was supplied by Telco, what was the approximate total of such saving?

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A. . . . The summation there of the wages saved, I have made a calculation to determine the exact figure, would be approximately $199,000,000 for Telco for the months Janu- [706] ary, '71, to February, '72; for Empire it is $428,000; for A T & T the partial information that is listed there sums to approximately $2.8 million; and from I guess it is Exhibit 101, which has the similar information for Western Electric Company, that would sum to approximately $29.4 million; and if you sum Telco, Western, A T & T and Empire, it comes to approximately $231.5 million.

Q. Which would be wages saved during the strike by the four plaintiffs combined? A. Yes.

Q. Did Telco also supply data on overtime payments during the strike period? A. Yes, it did. I believe that is the answer to Interrogatory 10, parts (a)(4)(d), and again I have summed that information.

For Telco, and this is the summation of all parts, (a), (b), (c) and (d), for Telco the figure is $149.7 million, Western Electric approximately $6.2 million, A T & T approximately $4.2 million, Empire approximately $301,000; and that sums to approximately $160,000,000.

The Court: And that is what?

The Witness: This is the summation of overtime paid for management, overtime for non-supervisory employees and wages paid for employees borrowed and wages for extra [707] guards.

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[708] Q. And was the overtime paid during the strike significantly different from the trend before and after? A. Yes.

The Court: 15 as opposed to 160?

The Witness: Yes.

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Q. Have you compared the wages which were not paid by the company during the strike period with the additional overtime expended? A. On the basis of the information supplied, the—

Q. What is the difference? A. The relevant figures would be $231,000,000 for the wages and salaries that were not paid during the strike period, $160,000,000 for overtime [709] and payments paid out to management, non-supervisory employees and others.

If you subtract from that $15,000,000 as a rough indicator of norm that one would expect, you would arrive at a figure of approximately $86,000,000 as the difference between what was not paid because of the strike and what was actually incurred over and above the norm.

Q. In other words,—

The Court: In working up these figures, are you including all of these extras that creep into all of these things, in other words, the normal loadings that go on a wage, all the Social Security and all the Unemployment Compensation and all the Workmen's Comp. and all of those figures, are those all in there, too?

The Witness: I am accepting the company's data that has been supplied in response to the interrogatories. I made no attempt to go in back and collaborate to determine whether it was right or not. I just accepted the answers in the interrogatories.

The Court: What is it they are purporting to give in 9?

The Witness: 9(b), for example, is the most important one.

The Court: Apparently their Footnote 2 indicates there were factors that should be added in these calculations in



[710] some fashion: fringe benefits, medical plan, et cetera. formation I found here, I could find none.

The Witness: Yes.

The Court: I am trying to get an assessment here of what we are talking about.

The Witness: At best you can determine this as ballpark kinds of answers to the questions.

Q. From your examination of the documents supplied by the New York Telephone Company, did you see any indication that there were other expenses which were increased because of the strike? A. Other expenses that were increased out of the ordinary on the basis of the information I found here, I could find none.

Q. Have you also examined, aside from the data Telco supplied, A T & T's balance sheet and income statements concerning the New York Telephone Company filed with the SEC, the Securities and Exchange Commission, for the years 1970, 1971, 1972 and 1973 which are Defendants' Exhibits 42 through 47? A. Yes, I have examined these.

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[711] Q. Did you examine maintenance expense on this exhibit to see if there was any deviation from trend that might be attributed to the strike? A. I examined the information in the exhibit here and I could find nothing.

Q. Did you examine the depreciation accounts on this exhibit to see whether there was any deviation from trend that might be attributed to the strike on the depreciation [712] account? A. There was nothing that stood out in examining the depreciation account.

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[725] Cross Examination by Mr. Benetar:

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[736] Q. All right. Had this information, which you have mentioned in the questions to which you have answered you did not have the data, were it available would you wish to have it for the purpose of making a meaningful comparison between extra costs incurred as a consequence of the strike and payroll not paid because the men were not at [737] work? A. Absolutely, sir. In fact, so there is no misunderstanding, the data I used here was limited data; it is very imperfect. The purpose was to get a ball park estimate.

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[749] Testimony of HAROLD KASPER; Direct Examination by Mrs. Marcus:

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[759] The Court: Wait a minute. Let's go to a man who is out of work and applies for benefits. What do you do in terms of checking what his efforts are to obtain work, what his skills are, where he might work, and so on and so forth?

The Witness: He files an application with the unemployment insurance division and we have an employment service, so that we classify—rather, we refer that person to the employment service. The employment service takes a history of the work experience of the individual and applies an occupational code and tries to effect a placement as [760] soon as possible and the onus is on the claimant when he reports weekly or bi-weekly to us to let us know about his efforts to obtain employment.



If we feel that his efforts are not strenuous, we examine him in the insurance office.

The Court: What would you regard as a satisfactory effort?

The Witness: Well, this varies with the occupation, it varies with the situation. If a person has a regular employer to which he is returning, I must say in all honesty, that our efforts are not as great as with a person who has no allegiance with a particular employer and is out of work and seeking work.

The Court: When you say regular employer to whom he is returning, that means he is either struck or locked out?

The Witness: No. He may be laid off for three or four weeks.

The Court: Does that include struck or locked out?

The Witness: Yes.

The Court: So you require less effort from somebody struck or locked out than you do from somebody who has been discharged?

[761] The Witness: At least the unemployment insurance office. I cannot say what happens in the employment service. That person must be ready, willing and able to take a temporary job. One of the objectives of the unemployment insurance law is to keep a labor force for the employer in question so that if there is regular allegiance to that employer—maybe I am using a stupid term, "allegiance"—if that person is going back to his regular employment, I think you can see, Judge, that our efforts per force cannot be as strenuous as with a person who has no attachment to a particular employer and whom we would examine more carefully.

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[762] The Witness: . . . We would ask did he look for work last week, "Are you ready, willing and able, did you work last week?"

The Court: Suppose he says, "I went out on Wednesday and looked for work but the other four days I stayed home and watched television," what do you do then?

The Witness: He really doesn't tell us that.

The Court: Suppose he says, "I went out one day and looked for work," and doesn't tell you about the other four?

The Witness: Depending upon the demand for the occupation, we will scrutinize his response. Let me give you an example which I think is more to the point: We have typists, stenographers, bookkeepers who are on our rolls and they are in demand, and here is where we take extra effort knowing that these occupations are in demand, so that we require them to report to the employment service more frequently and they are scrutinized more carefully.

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[765] The Court: You do not expect people in the strike situation to go out looking for temporary work?

The Witness: Yes, we do, but, in all honesty, our checkup in the employment insurance office is not as great, but the employment service bears the brunt of making referrals.

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[768] The Court: What kind of situation is a fair hearing required in and what is the nature of the hearing?

The Witness: Well, suppose we disqualify a person for leaving a job without good cause—these are claimant hearings—



The Court: He claims he is fired and the employer claims [769] that he quit.

The Witness: Under our law, we think we have a very decent system, quasi-judicial system, where we set up an impartial referee who does not report to that Department of Labor but to an independent unemployment insurance board whose members are appointed by the Government.

The claimant says, "Look, you are full of dash. I want a hearing." So he goes to the impartial referee. The impartial referee—

The Court: Is this referee a lawyer, by the way?

The Witness: Yes, it is a requirement that he be a lawyer.

The impartial referee either upholds the claimant or objects. If he upholds, we have the right to take the case one step further. The one step further is the unemployment insurance appeal board itself. So you go from the impartial referee to the unemployment appeal board, a board of three members appointed by the Governor—

The Court: Are they lawyers?

The Witness: Yes. All right, we go to the appeal board and now we are not satisfied, as the state, or the claimant is not satisfied and now there is an appeal to the [770] Courts, Third Appellate Division, and the State Court—

The Court: This is the third department that covers Albany?

The Witness: Yes. And of course the final recourse is the Court of Appeals and we have had cases of that type.

The Court: These referees, are they from a panel of referees that are always available to serve or are they designated as the situation requires?

The Witness: As the situation requires—well, both. There are panels and a referee has a calendar of, say, eight to ten cases a day and in special cases the referee with more expertise is assigned to the case.

The Court: These referees are sitting as a regular matter?

The Witness: Yes.

The Court: Do they take testimony?

The Witness: Yes.

The Court: If necessary?

The Witness: Yes, rules of testimony.

The Court: And witnesses are sworn and testimony is taken and the record is kept?

The Witness: Absolutely.

[771] The Court: So that if an employee claims that he was fired and the employer claims he quit, everybody here can put on witnesses and the testimony is taken and an opinion is rendered?

The Witness: That's right.

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[776] A. We did test studies and as I remember the figures, 75 per cent of the Telephone Company employees were getting the maximum benefit rate of $75.

I think AT&T Long Lines amounted to about 60 or 65 per cent, and Western Electric jumped to 86 per cent of claimants receiving the maximum benefit rate.

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[777] Q. How long would the employees at New York Telephone have continued to be eligible for benefits had they not accepted the company's offer in February, 1972?

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Q. So that would take them into July? A. Yes.

Mr. Benetar: Of '72?

The Witness: '72, that's correct.

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[791] The Witness: . . . The objectives of the statute—[792] the most important objectives are at least threefold:

One, we play a definite role in cushioning the economy. In 1975, for example, we paid out, New York State alone, 2.2 billion dollars in benefits, all programs.

If you take this on a national basis, it amounts to about 20 billion dollars.

The Court: Cushioning the economy. What is next?

The Witness: This money is not saved. These are hot dollars, they are velocity dollars, they are spread out in the economy; they pay the butcher, baker—I used to say the candlestickmaker, but now I say the electric company, and I include the New York Telephone Company.

So the other side of the coin is to aid the person who is out of work to pay his essential expenses.

[808] Cross Examination by Mr. Benetar:

Q. Mr. Kasper, you told us that unions and employers alike request speakers from your department or division from time to time, is that right? A. Yes.

Q. Talking about employers now, when they request it, do you try to provide them with a program that will enlighten them as to the benefits payable under the law? A. Yes.

Q. What their workers will get if they are laid off, right? A. Yes.

Q. And do you also enlighten them about what their [809] workers will get if there is a strike? A. Yes.

Q. And what the range of benefits is? A. Yes.

Q. And they show interest in knowing all these things? A. Yes.

Q. Isn't that true? A. Absolutely.

Q. You mentioned the name of a lady who works at the Telephone Company, Lillian Layton, from which I drew the inference that you perhaps know that she is part of a department— A. Yes.

Q. —that the Telephone Company maintains, year in and year out, to monitor unemployment insurance claims? A. A very competent department, a very competent person.

Q. And they watch for meritorious claims being processed and paid and unmeritorious claims being resisted, is that correct? A. Yes.

Q. Would you say that among employers they have shown a special familiarity with the law and its adminis- [810] tration? A. Absolutely.

Q. And pay special attention to what is happening to their unemployment insurance account? A. Absolutely.

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[814] Q. There are many staff full-time referees, are there not? A. Yes.

Q. They are called upon from time to time to resolve [815] hotly contested issues of fact, isn't that right? A. Yes.

Q. And sometimes the issues involve rather subtle questions of fact, isn't that true? A. Yes.



Q. For example, are there cases where an employee is discharged by his employer allegedly for cause and where he claims he was discharged for discriminatory reasons, by reason of race? A. Yes.

• • • • •

Q. And they are a body of experienced men? A. Yes.

[816] Q. Then there is an appellate division, I think you have told us— A. Appeal board. It is not an appellate division, unemployment insurance appeal board.

Q. How many persons are on that board? A. Three members—wait a moment. I think I misspoke. I think they enlarged it to five. I think it is now a five-man board.

Q. And this board is set up to hear appeals from the determination made by the referee in this supposititious case I gave you involving the claim of good cause or discrimination? A. Yes, either upon the objection of the claimant or of the state.

Q. Is there a stenographic record taken? A. Yes, either that or we have these record players now.

Q. Briefs are sometimes submitted? A. Yes.

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[817] Q. Where does the money come from to pay the claims chargeable to the employer with a negative account? A. Of course it comes from the unemployment insurance fund.

Q. What is the designation of that fund? A. The state [818] unemployment insurance fund.

Q. How is that fund made up? A. Made up from taxes from employers.

Q. Employers. And the Federal Government, I believe you told us, pays the administrative costs? A. Yes.

• • • • •

[822] The Court: I would assume, Mr. Kasper, that temporary work was much harder to find than permanent work?

• • • • •

The Witness: . . . [T]emporary jobs would be more difficult to get.

The Court: As to workers on strike, they are only required to be looking for temporary work?

The Witness: That is correct.

The Court: Who made that decision? Who established that rule? Is that some regulation?

The Witness: By the judicial process. Through our referee and appeal board decisions, which have the effect of law, this came into practice. I am not aware of any Court decision personally on this issue.

• • • • •

[830] Q. Do you perceive under point 2 an objective of the statute is to aid strikers to pay their essential expenses when the strike exceeds eight weeks? A. Yes, I do.

• • • • •

[832] The Witness: . . . So after eight weeks a person still has to eat, has to pay his non-deferred expenses, he has to eat, pay groceries, pay rent, pay electric bills.

The State has assumed a neutrality for eight weeks and stood aside, so to speak, hands off, because it has been our experience that most strikes have been settled in that time.

• • • • •



The Witness: Now we say he is as entitled as anybody else for a stipend to take care of his non-deferrable expenses because the State has been neutral, in effect, for 11 weeks, not only 8 weeks of neutrality.

The Court: Let me put a question to you and then think [833] on this very carefully:

Does the State cease to become neutral in the ninth week?

The Witness: I don't think so. My own opinion is that they don't.

The Court: The State continues to be neutral?

The Witness: It has evidenced the neutrality, and I must again refer back to the basic objective of the Unemployment Insurance law, to provide for non-deferrable expenses, and that after eight weeks positions have hardened and the amount of benefits that would be paid won't settle the strike either way.

It is a question now of providing some stipends to these people who are out of work and who need to take care of their non-deferrable expenses.

The Court: Let us keep in mind that in the ninth week the worker could theoretically get a hundred per cent of his pay plus whatever additional amounts in this case were offered by going back to work, and you have the situation where, as a condition of paying compensation, a worker is required to seek work elsewhere, or in your strike situation, temporary work, because you say that a reason you only demand temporary work in a strike situation is that you want to hold the labor force intact to return it to the [834] employer, am I right?

The Witness: Yes.

The Court: Whether or not that is inconsistent with what you should be doing is another question, but you have a little bit of an inconsistency in that a person who could go back to work and get his full wage plus whatever the extra increments are that are on the table does not do it, and yet you say you are still neutral when you pay enabling the person not to do that?

The Witness: I understand your question, Judge. Really it goes to the heart of the issue. What I am saying—

The Court: It does, that is why I want you to think very carefully on what you are saying here.

• • • • •

[835] The Court: Please listen very carefully to me. I phrase these questions carefully. I may be a judge now, but for 23 years I was a trial lawyer. I am accustomed to phrasing my questions very carefully.

You say you were neutral through eight weeks and in the ninth week you come in and you begin to pay. That is fact.

The Witness: This is so.

• • • • •

[838] The Witness: . . . It is true that when you are talking about the total amount that is paid out to strikers versus the total amount of moneys it is not large, but to the individuals concerned, both the merchants involved and the individuals involved, I don't see how we could do anything else.

• • • • •



[843] Testimony of MORTON BAHR; Direct Examination by Mrs. Marcus:

• • • • •

[847] A. . . . We had, really, from the period of 1958 right up through the time of 1971, the 1971 contract, a constant [848] period of turmoil, and the turmoil was between the locals and the international, between the locals and the company and, to some extent, between the international and the company. . . .

• • • • •

Q. What were some of the other factors which may have contributed to this turmoil which you described? A. We had a wholesale defection of our largest local union to the Teamsters, which required us putting the local union into receivership. All during this period the total number of grievances that were handled between the local unions and the company and the international union and the company far exceeded that of any other Bell System Company in a like period for a like number of employees.

[849] Q. Were there also lawsuits filed during that period? A. Yes, there were several lawsuits and the most recent one, in relation to the 1971 contract, took place just prior to that contract, where the Court fined—there were total fines issued against the international, the local union and one individual personally of almost $2 million, and that was just prior to the contract, which later was reversed on appeal.

• • • • •

[850] Q. How long has this pattern setting procedure been used in the Bell System? A. I would have to guess it was—my best recollection would be back in the early '50's.

Q. Would bargaining in the various AT&T subsidiaries continue while the pattern bargaining was occurring? A. Yes, but it would be kind of a holding operation. There would be meetings.

Q. Who chose the pattern setting unit? A. The president of CWA, with the concurrence of the international executive board.

• • • • •

[862] A. We believed it was—that it was a fair contract. It did not contain all of those things we would have liked to have. We did not believe that it warranted having a strike continue, and as a result of the local presidents in New York Telephone coming out opposed to it and urging the rejection, I personally wrote several letters to all of the members recommending that they ratify the contract.

• • • • •

[865] By Mrs. Marcus:

Q. Mr. Bahr, I read you now portions of these exhibits relating to the New York Telephone Company strike.

One from John Renck, president of Local 1106, which says the following—this is Exhibit 36.

> "I contend further that the five other elected members of the unions bargaining committee agree with my position. I or any other member of the elected bargaining team did not sign or in any other manner accept the New York Telephone Company's last offer for submission to the rank and file of the New York plant bargaining unit.



> "We never had a proper opportunity to negotiate the plant contract and that is the reason why we are unanimously urging its rejection."

• • • • •

[866] "The New York State presidents have requested me as chairman of their plant coordinating council to formally request the Attorney General of the State of New York to investigate the possibility of collusion between CWA and the New York Telephone Company to keep us away from the bargaining table."

• • • • •

[870] The Witness: See, these tapes—the messages on these tapes were also sent to me directly, and they protested very vehemently that they did not have the same right that other bargaining committees did around the Bell System of [871] having an equal time to sit at the bargaining table and negotiate on those items that they felt important.

• • • • •

[882] Q. What were the critical local issues in July 1971?

• • • • •

A. Well, there were many. The initial non-economic demands included matters such as supervisors performing bargaining unit work, matters such as the indiscriminate assignment of overtime to people without regard to their personal affairs, and I am not talking about emergency type situations, because our record is without parallel in emergency types.

• • • • •

[893] The Witness: . . . [T]his was the first contract in Bell that provided for a cost of living allowance clause, the

1971 contract, and it was based on the national consumer price index.

The period up to 1971 and for several years prior to 1971, the New York index had escalated well ahead of the national consumer price index and the single most repeated reason given to me was, "By gosh, there is no reason why we can't have the regional consumer price index rather than something that has Podunk, Kentucky," or what have you.

• • • • •

[894] From that point you heard mandatory overtime, "Why can't the company give me notice? Don't they realize I have problems at home, I should have the opportunity to call my wife? Why do they have to wait until five minutes to five to tell me I am stuck?" Or in cases the company insisted to have in the contract if they catch you in the parking lot until quarter after five you are considered on duty and they can bring you back. Why when the company interrogates an employee, where there might have been a theft in the building, or for whatever reason, why can't he have a union steward present?

Even in those cases where they used what we call special agents, many of whom have police experience, and two or three get one employee in a room and prohibit him from having a union representative—

The Court: Just detail for me the subject matters. I don't need the details.

The Witness: I feel strongly about it.

The Court: I can sense that.

The Witness: The absence control plan, where an employee with five years of service who perhaps in his last year or two had a bad luck of health, was treated—I should



[895] say an employee of 20 years service, they tended to discount his prior good service and treat him pretty much like someone with 5 years of service.

• • • • •

[896] Q. What part, if any, do you feel was played by the availability or receipt of unemployment insurance? A. At no time in my presence did anybody ever raise the question of unemployment insurance as being a reason to go on strike or to continue the strike. At no time did this union, of which I am a decision maker, ever in this strike or any other strike say, "Well, do we get unemployment insurance?" It just doesn't happen.

[897] From my judgment, the strike was inevitable and it would have happened whether there was UI or not and lasted just as long.

• • • • •

Mrs. Marcus: Your Honor, what I am trying to get at is whether the people on strike had previously been making higher salaries than their salary scale indicates because they were working overtime.

The Court: Ask him if he knows that.

The Witness: Yes, I do, your Honor. Just prior to these negotiations, and it would be in 1970 and into the spring of 1971, New York Telephone was on a vast service improve-

[898] ment program, where hundreds of CWA members were brought in from other companies around the country, but an agreement that had been reached was that our members in New York Telephone would receive a minimum of 12 to 15 hours a week overtime before anyone else would —a week—before anyone else would be permitted to work.

So the gross earnings prior to the strike were extremely high.

• • • • •

[899] Q. Does that mean the union's attitude towards the commencement of a strike or continuation of a strike would be altered by the fact that the union would cease to make food assistance payments because of the availability of [900] unemployment insurance? A. It would have no effect whatsoever.

Q. Why is that? A. Because we have more strikes outside of UI states than in UI states. The same benefits, combined benefits, the same needs that our members in New York Telephone receive are payable in Massachusetts, in Kentucky, or wherever.

• • • • •

[918] Q. I show you Defendants' Exhibit 50, the contract that was agreed upon between New York Tel and the Communications Workers.

Can you identify this? A. Yes, it is the contract.

• • • • •

Q. In that contract, sir, what was the difference in wages [919] between the pattern settlement and the settlement accepted by the majority of New York Tel employees in February, 1972? A. One dollar a week for some employees.

Q. Was the Saturday differential pay a substantial monetary gain? A. No, it was a gain, but I would not call it a substantial gain.

Q. Why was it not substantial? A. Well, first, the company controls how many people they will assign to work on Saturday as one of their regular five days of a work week,



and it is a significantly lower figure than those who work Monday to Friday, and the net gain would be for those who do work, would be 15 per cent above their normal rates.

So if it was a $40-a-day person, for him it would be a $6 gain, for just when he fell into those circumstances.

Q. Was this the same as the union demanded on Saturday differential pay? A. No, it was not.

• • • • •

[920] Mrs. Marcus: 78, your Honor, is already in evidence. These are statements of the company to the Wage Board. I would like to offer into evidence 77 and 79.

• • • • •

Q. Who drafted the document? A. The New York Telephone.

Q. Did the union make any changes on it? A. No.

Q. Reading from 78, the sentence appears, "Terms of agreement similar to Bell System pattern. All terms generally are identical with the pattern of those of other Bell System companies."

That was from the outline. Page 5 of the statement itself, these slight additions to the July 18, '71, pattern are insignificant especially when one considers that their per-[921] centages are significantly reduced for the first year of the contract because of the seven months' strike."

That was not your language but the company's language, is that it? You did not draft that language? A. That was the company's.

• • • • •

A. Well, the so-called gains, we covered two of them, one was some people getting a dollar increase a week and some getting a dollar-fifty a week increase.

• • • • •

[964] Cross Examination by Mr. Benetar:

• • • • •

[979] Q. The fact of the matter is that as long as the pattern bargaining had prevailed, you did not know of a single strike in which the pattern had been exceeded in CWA units, isn't that true? A. As a result of a strike?

Q. Yes. A. That's correct.

• • • • •

[980] Q. In a letter dated February the 4th to the members, you stated, did you not: "New York Telephone and A T & T repeatedly said they will never change the July 18 offer, and for more than six months they continued to say 'never.' They said 'never' in relation to new money and they said 'never' in relation to matters of principle. 'never' had been removed . . ."—the word "never" in quotes—'. . . [981] never' has been removed from A T & T's vocabulary.

"Although there are a number of significant improvements, we did not get all we deserve and are entitled to, but we broke new ground. We led the way for telephone workers across this nation. We will be looking forward to further improvement in 1974 in those former 'principle' areas. The credit for what has been accomplished goes to you, the member, whose perseverance and dedication was visible for all to see.

"This membership attitude, coupled with the support of the officers and financial resources of the union, about 15 million in defense fund money, convinced the Bell System to reach an accord.

"Here are some of those items that Bell previously said 'never' to."



You listed "The pay for premium for Saturday" as No. 1, and you said in that paragraph:

> "This is a major breakthrough that will lead to full-time and one-half payment for Saturday as such. This is a first in the Bell System."

Here what you were saying was that you got part-premium for Saturday in the 1971-72 strike, but you saw it as a foot in the door never previously inserted in the door to [982] get full premium pay of time and a half for Saturday in your next contract; true?

• • • • •

The Witness: I would have to say yes, qualified.

Q. "Full agency shop. New York plant is the only bargaining unit in the system with this benefit. All employees. [983] including strikebreakers, are required to either join the union or pay the equivalent union dues. There will be no freeloaders.

> "This proposal sets forth a temporary suspension of agency shop obligations for unauthorized work stoppages."

Did you regard the obtaining of a full agency shop as a significant item in your settlement? A. Yes.

Q. "Wages: The top two craft, linemen and up, will receive an additional dollar at maximum except in Zone 2-A where it will be a dollar-fifty."

• • • • •

[984] Q. . . . Was this the first time that there was a wage increase granted over the pattern to one of the Bell System companies under contract with CWA?

• • • • •

[985] A. . . . Where you are using a "pattern settlement" the answer is no.

Q. No? A. But there have been added increases in the Bell System in CWA following a strike.

Q. Well, at page 14 of your deposition you were asked:

> "Q. Do you know of any instance where an operating company struck to go above the pattern and did succeed in going above the pattern? A. New York is one.
>
> "Q. When you say 'New York' you mean in 1971? A. By you, yes.
>
> "Q. Is there any other you know? A. There are strikes by non-CWA unions in Bell. I just don't recall what the settlements were.
>
> "Q. I'm just talking of CWA. A. I don't recall any."

A. I stand on that, Mr. Benetar. If you are referring to [986] above a pattern—

Q. Yes. A. —the answer stands. . . .

• • • • •

Q. Thank you. I read you from your letter to the membership about the achievements in the strike. I would like to read to you what the national president, Mr. Beirne, said about this in the CWA News of February, 1972, Exhibit 162.

> "The New York Unit was up against an almost impossible task . . ."—



He is describing the situation confronting them when the strike was continued.

> ". . . trying to top the 33½ per cent pattern settlement [987] that was rated by the press as the biggest package negotiated by any industrial union in 1971."

Does that refresh your memory now about what the settlement in the basic pattern was? A. If you say that's what it was—

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[988] Q. Let us try to end this. Do you accept his statement as accurate or don't you? A. I accept what he said as accurate.

Q. All right. I call your attention to Exhibit 163, which is a column written by Mr. Beirne under, the title of "Off My Mind." It comes in the same issue of the CWA News, and he says there:

> "This is the first time in the history of the Bell System where they have made monetary improvements in a wage offer and benefit offer once a strike was begun.
>
> "There have been many strikes in the Bell System since shortly after the turn of the century. At no time have they ever added to the cost of their package. To us this is a significant change in viewpoint and the policy of the Bell System Management."

Did you take this as a sincere expression of Mr. Beirne's belief? A. I don't recall what my impression was at the time. I don't recall reading it.

Q. Do you accept his factual statements in there now?

[989] A. Well, I think he had one error, because I do recall many years ago where there was an agreement between Beirne and A T & T that did increase.

Q. You think so? A. I seem to recall that, something known as the Craig-Beirne agreement.

Q. Now let's get back to the news report in this same bulletin.

The Court: Before we move on. Is there any question, any dispute that that statement was made by Mr. Beirne?

The Witness: No. If he says it was in the CWA News, I am not quarreling with that, your Honor.

The Court: Go ahead.

By Mr. Benetar:

Q. Now, Mr. Bahr, Mr. Beirne made an evaluation of the settlement in the CWA News of February, 1972. He said:

> "Discussing the significance of the settlement 'which is a win' President Beirne pointed out two major breakthroughs in principle that 'break altogether new ground.' They are: full agency shop for the first time in any Bell System contract anywhere in the country (and pointing the way to similar agreement elsewhere [990] in the industry in 1974.) Premium paid for Saturday as such, although the amount will be limited to 10 per cent now, rising to 15 per cent next July; the recognition of Saturday as a premium day in itself is another 'first' long sought by the union. 'It is now reasonable to conclude that this can also be reconciled in 1974 throughout the System.'"

Do you recall this? A. It shows how wrong he was.



The Court: No. That is not the question. Strike out the answer.

Do you recall that statement being made?

The Witness: Yes. I remember reading it.

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[993] Q. I want to read another excerpt from Mr. Beirne in this same statement, or part of an interview with him.

• • • • •

[994] Q. "He gave accolades . . ."—'he' being Mr. Beirne, according to this newspaper—". . . to all who had contributed to the successful conclusion of a long and bitter strike, commending the local leaders who led a good strike, the executive board staff and members everywhere who helped.

"In Washington it was revealed that the strike had almost depleted the union's 15 million dollar defense fund. During the strike workers also become eligible for Unemployment Compensation under the New York law."

Do you have any recollection of this item in your CWA newspaper at all? A. Not specifically. It is, of course—of course the facts are true.

• • • • •

[996] Q. I want to inquire, did Mr. Sanchez, your deputy, report the incident of September 9th at the bargaining table to you when he told the company that Mr. Beirne said that "If you dare postpone unemployment insurance payments, you'll have the union at your throat for the next ten years." Did he report that to you? A. I'm aware of it, and I don't recall just how it was made aware. I'm aware of what you just read.

• • • • •

[1005] Q. At the beginning of the strike, according to the [1006] documents that I have seen here, you had about $13 million in the defense fund—"you" meaning CWA right? A. Yes, approximately.

Q. At the time the strike was over you had borrowed 2 million, right? A. Yes.

Q. And by the time the strike was over the 15 million was practically gone, right? A. Yes.

• • • • •

[1008] Q. Let's look at the figures. The union was prepared to spend $30 million for defense fund. How much was paid out—paid out by unemployment insurance, do you know?

• • • • •

[1009] Q. . . . Would you accept it if I were to tell you that the total amount paid out for workers of all three of the companies was somewhere between 48 and 50 million? A. Yes, I'd accept it.

Q. By virtue of the existence of this 48 to 50 million, you didn't borrow the additional 15 million—right? A. That's right.

Q. —you didn't go around to your membership, as you said yesterday you may do and ask for voluntary donations—right? A. Right.

Q. You didn't have to impose an assessment on your members outside of New York State—right? A. Right.

• • • • •

[1010] A. I'm sorry. In 1971 there was no program, financial or unfinancial, that I am aware of.

Q. And you never had to resort to an appeal for funds? A. That's right.



Q. The food allowances were discontinued as payments out of the strike fund when UI started, true? A. Yes.

• • • • •

[1019] Recross Examination by Mr. Benetar:

• • • • •

[1021] Q. . . . You said, in effect, we are constantly sending signals to the employer which may have an effect on bargaining even if we are not bargaining at that particular time. Did you just say that? A. We are bargaining all the time.

Q. That is right. When Sanchez got into that bargaining meeting and he said, "You are going to have us at your throats for ten years if you interfere with our UI payments," wasn't he sending a signal to the company that the union considered this an important item for its members and that they were really going to fight and fight long if the company fought them on it? Wasn't that a signal? A. We considered it an important matter for our union, and all unions.

• • • • •

[1022] JAMES WESLEY KUHN, called as a witness by the defendants, being first duly sworn, testified as follows:

Direct Examination by Mrs. Marcus:

Q. Where are you employed, Dr. Kuhn? A. At Columbia University, Graduate School of Business.

Q. In what capacity? A. I am vice dean of academic affairs and professor of industrial relations.

Q. How long have you been on the faculty of the Graduate School of Business? A. This is my twenty-first year.

Q. How long have you been vice dean? A. Since last July.

Q. What subjects do you teach? A. I teach industrial [1023] relations, manpower, collective bargaining, and a course called conceptual foundations of business, which examines the social, political and economic environment of business.

Q. What is your educational background, Doctor? A. I am a Harvard College graduate, my bachelor's, I took my master's and PhD from Yale. I studied at Oregon State College and also at the University of Sydney.

Q. Can you summarize your additional professional experience? A. Well, I have taught at Pomona College, University of Oregon, and Stanford University, and I served on the Council of Economic Advisers.

Q. What is the Council of Economic Advisers? A. The Council of Economic Advisers—I am sorry, I meant to say the staff of the Council of Economic Advisers. The Council of Economic Advisers is a three-man or a three-person group of advisers, who counsel and advise the President on all economic matters of national importance.

Q. The Presidents of the United States? A. Yes, the Presidents of the United States.

Q. For which Presidents of the United States have you functioned in this capacity? A. For Lyndon Johnson and Richard Nixon.

Q. What did that position involve? A. I was the in-[1024] dustrial relations and manpower expert on the staff, senior staff economist, and I reported to the President, particularly President Johnson, certainly weekly and sometimes almost daily, on industrial relations, collective bargaining developments throughout the country, and on manpower programs and the implications of all other legislative programs that went through the White House.



Q. Have you received fellowships in the field of economics? A. Yes. I received fellowships from the Ford Foundation and the Rockefeller Foundation.

Q. Have you any other professional affiliations? A. Well, I am a member of the Industrial Relations Research Association, the American Economic Association, two associations in Australia, mostly for sentimental reasons, and I served in various capacities with the National Council of Churches and the Presbyterian Church.

• • • • •

[1027] Q. You stated that one of the aspects of your study was to examine the theory about which Dr. Backman testified on Thursday. . . .

• • • • •

[1028] The Witness: The hypothesis was that, as I understood Dr. Backman—I must say I wish I had thought of it myself, because it is testable—that the payment of unemployment insurance affects the staying power of strikers, and thus it would cause either longer strikes or shorter strikes than otherwise; but in either case and inevitably it would lead to larger settlements than otherwise. And this, it seemed to me, was a testable way of putting the hypothesis.

The Court: What did you bring to bear on that hypothesis, given your background?

The Witness: Well, the longer and shorter strikes, since strikes can be either longer or shorter, it seemed to me

one could not do a great deal with that. One could not do a great deal with that, though one of the studies that I saw done by Dr. Perl did move in that direction. But it did seem to me that one could test the final conclusions of Dr. Backman's thesis, final implication, and that would be that wage increases would inevitably be higher in those industries in states that had unemployment insurance.

And so I checked out such industries in New York, which has unemployment insurance paid to strikers—

Mr. Benetar: Excuse me.

The Court: Let me be sure I understand what you are [1029] saying. I may have not recalled the specific testimony, but I don't remember anything being said about inevitably doing this or absolutely, but I think it was a question of a tendency. Are we not talking about tendency as opposed to inevitability?

Mr. Benetar: In the first place, we made no claim that wages would be higher—

The Court: Would inevitably be higher.

Mr. Benetar: That is right, be inevitably higher.

The Witness: No, wage increases, sir.

Mr. Benetar: We did not even say wage increases.

Mrs. Marcus: May I read from the transcript, your Honor?

The Court: Where are you reading from?

Mrs. Marcus: It is very simple to read from the transcript rather than to argue the point. It is page 366, and I read from the transcript:

> "Q. You testified that unemployment insurance in some cases lengthens and in some cases shortens strikes, is that correct? A. Yes, ma'am.



> "Q. In the cases where strikes are shortened, what is the effect on the wage settlement on the supplementary benefits included in the settlement? A. I [1030] would think that in those cases a higher price had to be paid in order to abort the strike and therefore would act to increase the cost of settlements.
>
> "Q. In the cases where strikes are lengthened, what is the effect on the wage settlement and the supplementary benefits included in the settlement? A. I would think it would also increase the cost because the relative position of the union and the workers is considerably strengthened and in the usual interplay in collective bargaining this would suggest a more liberal settlement at a higher cost.
>
> "Q. So then, Doctor, your conclusion is that whether UI has increased or decreased the length of strikes, wage settlements on the average will increase? A. I would think they would, yes."

The Court: That is my memory, and that is not "inevitably," but that is on the average.

The Witness: All right, I stand corrected then, your Honor.

The Court: All right. Let us go ahead on that basis. What thinking do you bring to bear on this testimony that you just had read?

The Witness: I then examined union wage data—and these would be average data by industry—for the two [1031] cities in New York that were available, Buffalo and New York City.

Q. Did you examine real wages or money wages? A. I looked at both, but I think real wages is the important variable here, the variable to which the workers do respond, and the data so indicated.

Q. What industries did you examine? A. We examined five industries. I have them down on a piece of paper, but I think I can remember them: local transit, trucking, job printing, newspapers, and construction or building.

Q. For what periods did you examine these industries? A. For New York City the period was 1947 to 1973, and for Buffalo the data are for 1964 to 1973.

• • • • •

[1036] Q. What were your findings? A. Well, what I did was to take the industries in Buffalo and the five industries in New York City, and then decided that we probably ought to make that nine industries, because local transit [1037] in New York City is public employees, and they are not eligible for Unemployment Insurance if they strike.

Putting aside that, there were nine cases of industries and workers wage rates. Five of those nine showed that the wage trend was lower than the wage trend elsewhere.

The Court: Where is "elsewhere"?

The Witness: Elsewhere in the United States, outside of New York.

A. And that four of them were above the wage trend in New York. This is for the same industry.

This, I conclude, was not statistically significant, because we have something very close here to 50-50, almost half were above and half below, and we would need at least seven of those nine industries or eight of the ten to be statistically significant.



Therefore, I concluded that the evidence did not support Dr. Backman's hypothesis and perhaps contradicted it.

Q. You referred to other aspects of the study as paralleling the work done in Princeton by Ashenfelter? A. Yes. This is a study looking at the effect of past wage increases upon present settlements, the duration of strikes, and the inclination or will of workers in demands or a willingness [1038] to stay out on a strike.

Q. How long did you examine that question? A. Well, as I mentioned before, I have been looking at that very close to a year. And I had further interest in that ever since the article came out in the American Economic Review in 1969. It was an innovative and very useful analysis.

Q. What were your findings on that aspect of your study? A. Well, it confirmed Ashenfelter and Johnson's analysis that there is a very high negative correlation between past wage increases and the propensity to strike, the number of strikes, and thus the willingness of workers to strike at the present time. It seems that when wages are high one time, then there is going to be a depressive effect on strike activity and workers willing to stay out at the present time.

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[1039] A. The significance of the negative correlation is that if workers receive an extraordinarily large increase at one time, there is quite a definite tendency for the next settlement to be considerably lower.

Q. What is the significance of the positive correlation between recent price increases and strikes? A. Well, that the higher—the faster the Consumer Price Index rises, the

higher the demand for wage increases will be, and the more willing the workers are to strike to enforce those demands.

Q. Is this why you considered real wages in your study of union wage rates in New York City and Buffalo? A. Yes. I think it is important and probably the only valid way to analyze wage trends as it affects workers' willingness to strike and their demands.

Q. According to this data, the employees' demands and [1040] willingness to strike in a particular industrial dispute are affected by the wage rate and settlement received in the past, is that so? A. Yes, that is so.

Q. Now— A. And very strongly so, according to the statistics.

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[1041] The Court: But how does it rule out the Unemployment Insurance factor? That is the key question we have.

The Witness: Well, I would rule it out completely, your Honor. I am saying if one accepts Professor Backman's hypothesis, then it is that no matter if you have the long strike or the short strike, the wages will go up, they will be increased. But since some of the industries do not show an increase while others do, then one has to explain why some are high and some are low. It appears inconsistent. While the hypothesis would be that all industries would show an increase above those elsewhere in the [1042] country.

The Court: Yes, I appreciate the principle that is embodied in what you are talking about, but are the two principles mutually exclusive?



The Witness: I am sorry, sir, which two principles?

The Court: Your principle that if one wage settlement has been high, the succeeding one generally tends to be, I take it percentagewise, lower. That does not exclude the fact that the presence of Unemployment Compensation in New York might have resulted in each of them being higher than it might have been had there been no compensation in the picture.

The Witness: Yes, sir, I think it does exclude that.

The Court: In what way?

The Witness: Because, in looking at the different industries, the trend of wages in the two cities in the different industries, we find some are consistently higher and some are consistently lower than elsewhere in the country. While I would expect under the Backman hypothesis for all of the industries, since they were all subject to the same forces of the Unemployment Insurance, to respond the same. And I would explain that by my second study of the effect of [1043] past studies—of past wage increases, and that is that they tend to average out.

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[1044] Q. You mentioned that there are other aspects of your study that have gone back to the publication of your very first book. Can you describe this aspect? A. Well, this is a problem and an approach to collective bargaining of which I have long been interested, and that is examining strikes by the kind of issues—classifying strikes by the kind of issues that are involved in them.

This follows along very much a classification that Professor John Dunlop, my long-time mentor and colleague,

and Derrick Bok, president of Harvard, a professional colleague of mine, have also used.

I think it helps explain strikes in a way that I find a good deal more satisfactory than Professor Backman's hypothesis.

Q. Can you describe these classifications? A. There are three major ones: the first one is that strikes and [1045] disputes arise over issues of substance, you might call them: wages, hours and working conditions. These are usually relatively easily settled and disposed of, though sometimes they lead to strikes. But usually they are shorter strikes.

Intermediate kinds of problems might be called the industrial relations problems of those disputes that involve intra-union political disputes and conflicts, or even sometimes intra-company or intra-manufacturing association disputes, problems over the timing of the contract; and, the third, which I think is most relevant to this present situation, are those most intractable issues of all dealing with the structure of the collective bargaining relationship, and that is who will set a pattern, which union leads off or which company leads off; the issue of if it is going to be a craft union or an industrial union; the major changes where grievances are to be settled, as in the steel strike of '59 and '60, to be settled at the local level or at the national level. Strikes such as these are exceedingly intractable and difficult and there is no easy solution to them.

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[1049] Q. If there were no data in support would this mean that Dr. Backman's theory could be supported on assumption alone? A. I do not think so. In that case any other reasonable assumption or assertion could be equally true.



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[1050] Q. Did Dr. Backman assume that sources of income were limited? A. It seemed to me he did in his initial statement, but later pointed out that there are other resources available to strikers.

Q. Is this assumption supported by the book Welfare and Strikes by Thieblot and Cowin on which Dr. Backman said he relied? A. It is asserted by Thieblot and Cowin, but I saw no evidence in the book that the workers are so [1051] limited, and, in fact, I think there is one statement in the book where the writers say, if I can remember, that one would have to be positively clever, both friendless and improvident, in order to starve during a strike.

I think I would agree with that, that in a society as rich as this, with the amount of resources available to people, even such as migrant workers, who are probably among the poorest in the country, they can and have conducted themselves on strikes, finding support in all kinds of ways, if the issue is important enough.

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The Court: Before we leave that. I suppose that at some point everybody is entitled to welfare.

The Witness: I am not sure of that, your Honor.

The Court: Let us think about that for a minute.

The Witness: Your Honor, I would say even without welfare, looking back on the history of strikes—

The Court: You make the general comment that everybody on strike is somehow going to find a way to finance himself.

The Witness: Yes.

The Court: If money runs out, public assistance at some point becomes available because the community is not going [1052] to let a member of the community starve, isn't that correct?

The Witness: Yes, sir, but I would say even before the community took that burden upon itself—workers struck. struck long and found resources to support themselves.

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[1053] Q. Does Dr. Backman relate his analysis in any way to the issues which cause strikes? A. I did not hear him refer to the issues as an important matter in strikes.

Q. What is the effect of this? A. Well, I think that the effect of that is to disregard the key to what strikes are all about.

Strikes occur because there is a dispute over issues and the parties' focus is upon the issues and the settlement of those issues, not upon what may be happening down the road. The strike is over when the issues are resolved.

Q. Have you reached any conclusion about the effect of unemployment insurance payable after an eight-week waiting period on the resolution of strikes? A. Yes, I have. And based on the evidence I have seen, I would conclude that there is no relationship.

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[1077] Q. Can a long strike be won economically by employees? A. I do not think so.



Q. Why do you say that? A. I say that because in almost any calculation of the loss in wages and the other costs run up by strikers that are not immediately met, it takes if you calculate actuarially—or not actuarially—on a compound rate of interest discount, you discover that almost any possible wage increase is so small that they are going to come out in the hole.

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[1098] Cross Examination by Mr. Benetar:

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[1106] The Witness: If collective bargaining includes the subjective feelings and evaluations of the parties, then certainly their opinions about unemployment insurance affects collective bargaining.

The Court: You mean it is the difference between expressing it and not expressing it?

The Witness: Yes.

The Court: You say that subjectively, without expressing it, it may be a factor?

The Witness: Yes, it may be a factor in collective bargaining that is so broadly defined that it includes that, [1107] but if you are looking at the outcome of collective bargaining, I see no connection.

The Court: I am not sure what you mean by outcome.

The Witness: The settlement or behavior—

The Court: If you say it is arguably a factor in the thoughts of people in negotiating, therefore necessarily the negotiated result has been part of the factors going into that negotiated result and it is a factor, it doesn't drop out because a result is arrived at.

The Witness: It may, it may drop out or be acted upon by another factor and until one explores all the factors, one could not say what is the final result.

The Court: Go ahead, Mr. Benetar.

By Mr. Benetar:

Q. Dr. Kuhn, you appreciate, do you not, that in collective bargaining the strengths that the respective parties have play a part in the outcome of their negotiations? A. Play a part, yes, sir.

Q. That is all I asked you. You also appreciate that the strengths which the parties estimate they have play a part in collective bargaining, isn't that true? A. In collective bargaining broadly defined, yes, sir.

Q. Now, you have written on this subject, haven't you? [1108] A. Yes, sir.

Q. And you have said in your book on collective bargaining, page 172, "In terms of an agreement process the most meaningful view of the cost of someone disagreeing with you on your terms is that person's conception of the costs. His prediction or estimate of the cost to him of disagreement with you is conclusive with him. He may be either right or wrong, of course, as he may discover during negotiations or as you may be able to convince him. Consequently, bargaining power becomes in part a matter of influencing the psychological reactions of the negotiators. One may use the tactics of sheer bluff, but it is also possible to influence another's estimate of the cost of disagreeing on your terms by a straight factual approach if you believe he is operating on an unwarrantably optimistic estimate."



Did you write that? A. May I see it, please?

[1109] Q. Of course you may see it. Don't you remember it? A. Yes, it sounds familiar. I want to see what chapter. Which page, sir, was that?

Q. 172. Toward the bottom. In fact, the last paragraph that commences, "In terms of an agreement process." A. Yes, sir.

Q. All right. Now I want to ask you a question, Dr. Kuhn: If a union believes that strike power is enhanced by unemployment insurance, and so expresses itself, in your opinion, if they believe that, is unemployment insurance exerting some influence in the bargaining situation? A. I do not see how one can say, Mr. Benetar, unless you know the influence of the other factors, because this psychological factor may be offset by others.

Q. I didn't ask you to weigh the factors. I understand there is more than one factor in bargaining.

The Court: Well, I think Dr. Kuhn has said yes, it's a question of what happens to that factor, that is all he's saying. He says, it is a factor. All right.

Mr. Benetar: All right.

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[1111] Q. . . . Now I would like with you to take a little closer look at some of these documents which you have swept aside on the ground that they tell us what they, meaning the union, thinks, but don't tell us what they do.

Let's take a look at some of these documents together. And by the way, how many of the documents that are in evidence here did you personally read? A. Well, I won't want to give you an account. I've read more than I ordinarily would have. I went through dozens of them.

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[1117] Q. So that in this, your surprise would have been [1118] if the union had not been looking to see that their workers received whatever unemployment insurance they were entitled to, am I correct about that? A. Yes, you are correct.

Q. And would you then agree that since the union was out on strike, and the workers were out on strike, the union saw this unemployment insurance as a means of helping to support their workers during the strike? A. Well, what do you mean by helping support?

Q. Well, I mean half of their pay with a maximum of $95 a week. Now I cannot make it any simpler than that.

Do you consider that if a man gets half his pay up to a maximum of $95 a week, that he is getting help to support himself; yes or no?

Mrs. Marcus: Objection.

Q. Let's get on this—

Mrs. Marcus: The question is about a situation in 1971, and the maximum was $75.

The Court: $75 a week.

Q. 75, I stand corrected. A. I don't think it can be answered yes or no.

Q. You don't know? A. No, sir, because it depends on what the alternative is, whether it is extra help or help [1119] at all depends on what the other resources of the workers are.

Q. Well, if he can get this help from the State, without going on welfare, without borrowing from his relatives, without dipping into his savings, without, as you suggested, cashing in the cash value of his life insurance, wouldn't you



be willing to say that the payment of this unemployment insurance was a help to the workers during this strike in helping them support themselves? A. I'd be cautious in that because—

Q. I beg your pardon? A. I would be cautious in saying that, because while many workers did take the unemployment pay, others did not.

Q. Well now, there were 29,000 who took the unemployment pay in New York Telephone Company alone. A. Over the whole period.

Q. Does that overcome your caution in any respect in saying that it was a help to these people? A. No, sir, because as I understood, there was some 38,000 strikers total.

Q. And so you're saying, taking the 38,000, that because only 29,000 collected $43,000,000, you would be hesitant to call that helping the strikers to support themselves during [1120] their strike, is that right? Is that what your caution stems from? A. Both that, since not all members took it, went after the unemployment insurance, and secondly, that they may well have had other resources, as the large number who apparently did not indicate.

Q. Well now, I want to ask you, if you were a worker, and you had savings on the one hand and the right to go to the unemployment insurance and get half your pay, on the other hand, without dipping into your savings, which would you do? A. It depends on what the issues are involved and how the people see it, Mr. Benetar.

Q. In other words, you're saying that if the issues in the strike were of one kind, the man would rather dip into his savings than collect unemployment, but if the issues were of another kind, he would rather get unemployment than

dip into his savings; is that what you are telling the Court? A. No, sir, I misled you.

I meant, the issues both for the person himself, both as to his own resources, his own economic situation.

Q. Whatever his economic situation—and I put it to you again—if you were a worker, and you had the choice of dipping into your own savings, mortgaging your home, [1121] cashing in your life or borrowing on your life insurance, selling your car, borrowing from your brother-in-law, on the one hand, or going in and collecting 50 percent of your unemployment, of your wages up to a maximum of $75, and you were on strike, which would you do? A. I do not know, sir, and the fact that somewhere between, the difference between 29,000 and 38,000 workers did not go for unemployment insurance, suggests that one would have to look at those various reasons that people chose not to—

The Court: Dr. Kuhn, how about the 29,000? Did they accept it because they were, they decided they would rather use it than personal savings, personal sources?

The Witness: I would assume so, yes, sir.

The Court: As to them, would you say it was a help?

The Witness: The mere fact that they took it, I would take it that they did see it as a help.

The Court: All right, go ahead.

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[1129] Q. I would like to read to you from Exhibit 184, which is a report of the defense fund committee of the CWA to its 6th Annual Convention. This was a committee that was charged with the duty of looking into the question of strike funds and reporting back on the wisdom or desireability of creating one.



Do you remember reading this document, 184, which is the report of that committee? A. I think so, sir—yes, I do. [1130] Q. Do you remember reading, "It was recognized that regardless of every other consideration the union could not hope to survive unhurt in time of stress without an adequate defense fund. The experience of every union that has ever joined battle with its bargaining adversary in a show of strength proves that a war chest under one name or another is an absolute must"? Do you remember reading that? A. I remember reading it, yes, sir.

Q. I will read you a little more before I put my next question: "Therefore, realizing that the chief use of a defense fund is to strengthen a union's position at the bargaining table and where necessary to sustain effective strike action, the committee was compelled to reach the conclusion that the defense fund should properly be under the control of the International Executive Board. The defense fund is a tool, it is one of the bargaining tools similar to such a bargaining tool as statistics which are gathered by the research department and cannot do a job unless it is held in proper hands. Under the control of the same party which is responsible for collective bargaining, the defense fund is the primary means of implementing the bargaining program. Operated in any other manner, it would not truly be a defense fund at all, it would be something else."

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[1131] The Court: Dr. Kuhn, buried in those sentences is the denomination as a tool, weapon, defense fund, strengthening at the bargaining table, and the question to you is, do you as a member of a university faculty disagree with the union members who were involved in setting this up

as to what they conceived it to be? They are stating this as a fact and you are here as an expert. Does your opinion disagree with what they have stated as a fact?

[1132] The Witness: Yes, it does, your Honor.

The Court: For what reason do you disagree with it as a fact?

The Witness: I disagree because we have too many other cases of unions not having strike funds that conduct strikes successfully and long.

The Court: Well, some armies can win a battle even without having sufficient number of tanks, but that doesn't mean that a tank is not a good weapon for an army to have. Isn't that the comparison?

The Witness: I would not think so, sir. If you have tanks in Viet Nam, it doesn't help you at all and is not an appropriate weapon.

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[1135] Q. Well, now, let me read to you again. "As a result, each party has made efforts to increase the effectiveness of these tactics"—strike and lockout—"and to render itself immune to the tactics of the other."

Now, that means the union on its side is trying to render itself immune to the employer's countertactics.

"The efforts have centered primarily around the union's seeking to strengthen the strike weapon and management seeking to weaken it."

Now up to there, there is no doubt that you were teaching that unions seek to strengthen their strike weapons; no doubt, is there? A. No.

Q. Answer for the reporter, please. A. No.

Q. All right. "In some of the earliest recorded turnouts



of journeymen, we find evidence of the use of strike benefits [1136] to lengthen the staying power of the workers and thus increase the cost to the masters of disagreeing with them."

Weren't you saying there, immediately following the previous sentence about strike weapons, that an illustration of this is that strike benefits are used to lengthen the staying power of the workers? A. No, sir. And if you will read carefully what I said, it is that in some of the earliest recorded turnouts of journeymen we find evidence of the use of strike benefits to lengthen the staying power. But there is no evidence that the strikes in fact were lengthened and in fact I suspect that there is—well, I know there is no evidence one way or another on that.

Q. Well, now we will come back to that question of evidence one way or the other in a moment. But I'm going to get back to my question to you, and that is, do you still say that strike funds are not strike weapons in any sense of the term? A. Yes, sir, I will, and the reason is that in this case, and I went back and looked at the nature of these strike benefits, they were actually loans made by the union that had to be paid back after the strike, so the effect then was to strengthen a union as an organization rather [1137] than to affect the strike.

Q. Well, then are you saying that because there were loans, they were not a strike weapon? Is that what you are saying? A. Well.

Q. Isn't cash a factor in providing the means for a union to help keep its members together during a strike? A. No, it means that the relationship between the worker and the union was changed, and that is what was important. The union was seeking a device to protect itself as an organiza-

tion; and winning the strike was incidental, and it lost most of their strikes.

Q. Well, if you gave an illustration here, in the context of talking about strike weapons, of a case where the union loaned money to its members, wouldn't you agree that the effectiveness of a fund as a strike weapon would be enhanced by the fact that the union was giving the money and not lending it? A. No, sir, we do not know. One has to look for objective evidence.

The Court: Mr. Benetar, go on.

Mr. Benetar: Yes, sir. I'm going ahead.

Q. Did you observe that the union in this strike resisted threats to the strikers' receipt of unemployment insurance [1138] and issued tapes to that effect? A. I didn't quite understand the meaning of your question.

(Question read)

A. I don't quite understand what you mean by threats.

Q. Let me read you a few of the tapes, then.

24; Exhibit 24. "According to the Staten Island Advance on Friday, December 3, our councilman, Frank Dondeauld, introduced a resolution which asks the state legislature to repeal the law enabling strikers to obtain unemployment insurance. This ex-dentist now finds he has all the qualifications for public office, is certainly alienating labor, and will find this out when he tries for re-election."

Did you read that? A. Yes, sir, I did.

Q. And when you saw that they were saying that this man was alienating labor, didn't you understand this to mean that by taking away unemployment benefits to strikers they were weakening the position of the union and the



strikers in the strike; didn't you understand that? A. Not necessarily weakening it. Making them unhappy, yes, but not necessarily weakening it.

The Court: Why did it make them unhappy?

[1139] The Witness: Because as union leaders they were concerned that they be able to demonstrate to their men that they have gained something for them, that they have gotten their share or their place at the public trough, so to speak. And as union politicians, they are very sensitive to that.

The Court: What had they got in the public trough, as you put it?

The Witness: A right.

The Court: What does that right consist of?

The Witness: Of getting funds.

The Court: And what can the union strikers do with those funds?

The Witness: Whatever they do with any other funds that they receive.

The Court: Go ahead.

Q. Exhibit 36, tape: "In last night's Gannett chain newspaper they editorialized again about aid to strikers and referred to a survey recently taken by New York State Senator Bernard Gordon. The response in his area, the 36th Peekskill area, was that 76 percent responded against aid to strikers. They also mentioned that there are many union people in the Peekskill area who are against aid to strikers. I would like to see our members write to Senator [1140] Gordon and give their views about aid to strikers."

Now, this was written in 1973. Now listen to this: "If

we didn't get aid during the big strike of 1971 and '72, I don't know where we would be right now."

Now, this is a year after the strike was over. The union is urging their members to do something, right? A. Yes, sir.

Q. Did you give any weight in connection with trying to see whether unemployment insurance played a part in collective bargaining and strikes, did you give any weight to the statement of this union official that if we didn't get aid during the big strike of '71 and '72, I don't know where we would be now? When he's talking not about aid from the union, but aid from the state; did you give any weight to that? A. I would give very little weight to it, Mr. Benetar.

Q. Would you give any weight to it? A. Simply as an opinion of a man who is puffing his own political situation.

Q. Puffing his own political situation, a year after the strike was over? A. A year afterwards, he wants to make sure that the unemployment insurance continues and that the union get credit for it.

[1141] Q. Well, now, he doesn't say anything in here about the union getting credit for it. A. He doesn't have to, Mr. Benetar.

Q. Excuse me, he doesn't say anything in here about that. He's urging the members to go out and lobby against the repeal of these benefits and as an appendage to that urge to action, he is expressing a reaction— A. He's trying to scare the workers into saying, look, if you don't do something, something bad will happen, but I don't think that is evidence of a kind that I would take terribly seriously.

Q. Would you take it into account at all if you found that there were other statements by this union in which they were giving unemployment insurance an important credit



in achieving the solidarity of the seven months' strike; would you take them together as having some substantial weight? A. I would give them substantial weight if they were followed by objective evidence that had some consequence.

Q. All right, we will have to come to the objective evidence.

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[1147] Q. Well now, I'd like to read you from Exhibit 236. Did you see this, a statement by Mr. Abel, in the United States News and World Report? A. Yes, sir, I read that.

Q. Unemployment pay. Part of the public assistance that went to strikers was a payment of $9,000,000 collected by New York Steel Workers from the State Unemployment Insurance Fund.

[1148] The report says that 85,000 workers shared in this payment—I'm not sure that is 85. It is a bad copy. Shared in this payment, after going through a 49-day waiting period.

The New York experience, Mr. Abel said, offers a political lesson for his members in other states. He reported this staggering sum of assistance to our striking members in New York clearly demonstrates the need for political activity to legislate humane and fair unemployment compensation laws.

You did read that? A. Yes, sir.

Q. And did you perceive now—withdrawn.

You recognize him as an important labor leader in this country? A. Yes, sir.

Q. Didn't you? A. Yes.

Q. Head of one of the largest unions in the country? A. Yes, sir.

Q. And did you perceive now that he is not talking in terms alone of what his union received in a specific state, but he is talking about extending this type of legislation [1149] to other unions so that they can get the kind of help that the steel workers got in this strike, did you perceive that? A. Yes, sir.

Q. Did you give that any weight in forming a judgment as to whether he saw unemployment insurance as a factor of importance in strikes and in collective bargaining? A. I gave it importance that he saw that it was important, but I would disagree with him that that was what his real concern is or that the evidence indicates.

Q. Well now—

The Court: You just don't credit the statement?

The Witness: I credit the statement that he thinks it is important, but since he has other reasons for wanting it, I suspect in the absence of any contradictory evidence, that it is those reasons that he is really for unemployment insurance.

The Court: Why do you say that—this is what, the president of the Steel Workers, Abel?

Mr. Benetar: Yes.

The Witness: Yes, sir.

The Court: On what basis can you, as an economist, giving expert views on things, say that a man who says some-[1150] thing in the public print, that is acknowledged to be authentic, doesn't mean what he says?

The Witness: That is not what I'm saying.

The Court: That is in essence what you're saying, he does not really mean it. He means something else. Or you suspect he means something else.



The Witness: No, I am sure it is important to him, and that he thinks it is important to the union. I do not believe that it is, however, important in the length of strikes or the kind of settlements that he gets, because he hasn't made a study of that. And it would cause great problems—

The Court: Well, do you know that he hasn't made a study? Do you know that he hasn't in his years of experience come to some kind of a judgment on this? Do you know what his thinking is? What is the basis for that?

The Witness: I don't know his thinking. I have never met Mr. Abel. I have talked to his research assistant, research directors, however, and am pretty familiar with the kind of studies that—

The Court: Have you asked them what they say about unemployment comp; figuring in bargaining in a strike?

The Witness: I have talked—I have not talked to the steel workers, but I have talked to other labor leaders. [1151] The Court: I know. I'm talking now—we were staying with Mr. Abel, and you had said that you suspected he really did not mean what he was saying, and I am trying to get down to why the Court should credit that answer.

The Witness: Not that he didn't mean what he said, but that what he said I do not believe has any objective evidence to support it, therefore it is simply an opinion of his.

The Court: I know, but I am asking why you choose to say that no—you would give no weight to that, whereas the president of the union that has had years of on the line experience, makes this kind of a statement, you reject it. Now on what basis do you ask me to reject it, given this assessment?

The Witness: Your Honor, I would suggest that if it not be rejected at least it be held with considerable suspicion . . . .

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[1152] The Court: You see, the thing that I keep coming back to in all of this, and I am obviously going to have to decide this issue somewhere along the line, but it does seem to me that a reasonable trier of the fact could say that if a person was in the tenth week of the strike, and he was getting half of his pay tax free, that he is motivated, he is more motivated to continue the strike than if he is getting none of his pay of any kind, and whether he gets more money or less money is not necessary—I say that a reason-
[1153] able trier of the fact could conclude this, that if he's got a family, a wife and two kids, and rent, and food, and payments on the TV, and he is getting half his pay tax free, he is in much better shape and much more motivated to keep on striking than if he isn't getting that money, and would you say that that is not so?

The Witness: Your Honor, with all due respect, I say that is very much like, it is putting the problem backward in the same way that if one, this childish game of counting fingers up to 11 by saying, 10, 9, 8, 7, 6 and 5 make 11, and you come out with the wrong conclusion, I would say to focus on the strike as if the strikers are aiming to increase their resources or benefits because they strike is the wrong way to look at a strike.

A strike is to resolve a dispute over issues.

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[1155] The Witness: . . . I think this is where one needs to be careful and this may be the difference between legal



philosophy and economic philosophy, but I would say that predicts certain kinds of behavior from the strikers and the union members, and if there is going to be predicted behavior then it should show up in our statistics. That it does not, and perhaps is even contradicted, leads me to take a very cautious attitude towards drawing causal relationships between unemployment insurance and the outcome of collective bargaining.

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[1158] The Court: How do you account for the fact that in every state except New York they voted to settle in July or early August?

[1159] The Witness: That gives reason to look at New York, but then I would also want to go back to Ohio or other states that may have had long strikes in the telephone company and see why they had them, and if they had long strikes without unemployment insurance that raises questions as to whether long strikes and unemployment insurance have a relationship to each other, causal relationship.

The Court: There was an offer put on the boards that was accepted everywhere but in New York. What does that tell us about this local versus international?

The Witness: That tells us that there may have been peculiar reasons why the locals were upset and here you have to go into the history of the collective bargaining relationship and what was happening to the local unions.

The Court: Then the locals in New York could afford to get upset, whereas the locals in other states could not afford to get upset?

The Witness: One could put it that way but—

The Court: The locals in New York would get financed after 8 weeks—

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[1165] Q. When you recognize that it was in their interest, what you are saying, in effect, is it not, that it was to their interest and as to their interest to see that strikers do get unemployment insurance during strikes. A. To the union, as an organization interest, yes.

Q. Do you say it is of aid or interest to the union but not to the employees who are members of the union? Is that what you are saying? A. It is not necessarily aid and assistance to the union members or the employees on strike.

Q. How does it aid the union? Tell us about the part that you admit. A. It is an aid to the union in that the union will take credit, whether it is really due or not, for the union effort in the lobbying for such legislation. The union leaders can say, "We went to Albany and persuaded them to pass such legislation," or "persuaded them not to repeal it."

Q. And you consider that the only value in the whole performance by Mr. Abel and his recommendation, that the unions would be able to say, "We have been trying to get this legislation extended"? A. I don't know why you say "only." That is a very significant function of trade unions.

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[1166] Q. But would it have a context, would it be that the employees might see some interest for themselves in the extension in other states than New York of unemployment benefits, or do you think it was a pure muscle-flexing [1167] exercise by Mr. Abel? A. I guess since I see no evidence presented by either Mr. Abel or elsewhere as to



the outcome, that I would assume it is a muscle-flexing exercise.

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[1174] Q. You say at page 187 of your book, "When bargaining power is viewed in this manner"—under the heading "Conclusions"—"it follows that it may be altered in one of two ways: (1) by changing the cost to the other party of agreement on one's terms, or, (2) by changing the cost of disagreement."

[1175] Now, one way of changing the cost of disagreement from the union point of view is if the union finds resources with which to continue a strike, isn't that true? A. Yes, sir.

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[1178] The Court: No. When to your knowledge does the average worker, union or non-union, run out of this kind of resource during the course of a strike?

The Witness: Well, sir—

The Court: Obviously—let's forget the strike. When does he run out of such resources?

The Witness: Sir, I do not think we have any evidence that in this country they do run out of such resources.

The Court: There comes a time where you hit welfare, right?

The Witness: Well, I don't know that—sir, as I said last time in my direct testimony, before we had community services employing welfare, strikes have often went on very long and with migrant workers in the agricultural sector, we find workers without receiving welfare and still will conduct strikes exceedingly long periods of time.

This is a very wealthy society—

The Court: I know, we are talking about people who own homes and own cars.

The Witness: Again, it depends on the issue.

If it is worth the sacrifice, we can tighten up and find resources almost endlessly.

[1179] By Mr. Benetar:

Q. Are you saying, Dr. Kuhn, that where the workers do not have unemployment insurance, they have to take recourse to other resources, some of which may be public funds, some of which may be their own funds, right? A. Or business funds, yes.

Q. What? A. Or business funds.

Q. Or business funds. What does that mean, business funds? A. Well, store extended credit or in some cases, as in the case of General Motors, to do its loaned money to the union.

Q. Now, when they do it that way, are the funds which they are borrowing or invading, being used to help them support and continue the strike? A. Well, again, I think that is the backward way of putting it. It enables them to support—

Q. Are you unable to answer me yes or no on that? A. I think I am unable to answer you yes or no. What enables them to continue the strike, Mr. Benetar—

Q. Well, if you can't answer that yes or no, Dr. Kuhn, I don't want to pursue it in the form of a dialogue.

When a man goes for welfare during the course of a [1180] strike, isn't he seeking aid to keep him and his family from want? A. No, sir. I think that that is a backward way of putting the matter.

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[1181] Q. All right. Now let me read to you from your [1182] book, page 174:

"Under some conditions striking workers may find that the costs of a strike decrease over time rather than increase. For example, in the State of New York, unemployment insurance becomes available to strikers after 8 weeks."

Now, this is you raising the question of unemployment insurance, isn't it? A. Yes, sir.

Q. "Two months after the beginning of the long New York City Newspaper strike of 1962, '63, the average striker was receiving enough strike benefits and unemployment pay to total $120 a week, a payment comparable to his regular take home pay.

"In the long steel strike of 1959, federal, state and government local benefits and relief provided the striking workers with at least $22,750,000 worth of aid. Full records may well have disclosed the total government assistance to have been in excess of $45,000,000 according to the union's secretary-treasurer. Or if other related jobs are plentiful strikers may find work elsewhere and feel very little pressure to agree with management's terms."

Do you remember writing that? A. Yes, sir.

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[1183] The Court: Doctor, you say here that under some conditions striking workers may find that the costs of a strike decrease.

What does that mean?

The Witness: It means that the loss of—well, for example, in this case, the loss of wages was mitigated because they received unemployment pay.

The Court: All right. Isn't that a factor that is taken into consideration, maybe not crucial, maybe not the critical [1184] one in some cases, but isn't it a factor? A. It would be a factor that one would then have to look at the cost of agreeing and see how the bargaining power and the outcome reflect it.

The Court: But we agree it is a factor?

The Witness: A factor, yes, sir.

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[1187] Q. I am not going into the subject matter of the book. I am off on another point which you will see in a moment. I observe from this that in the book he quotes materials which include union publications, speeches by representatives of labor and industry, letters written by union members, magazines, such as Business Week and Fortune, excerpts from congressional hearings, containing testimony by labor representatives or management representatives, and company statements concerning their labor policy. I don't know whether you are able to say offhand that you recall that all these things are in the book, but it doesn't surprise you for me to list them and say that they are referred to in the book. A. Oh, yes, I am familiar with the book.

Q. And would you say that it is accepted practice in the field of economics when researching or teaching a subject to have recourse to this kind of source material along with other material in the assembly of a total picture? A. Yes, sir, a total picture.

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[1188] Q. Now, let's go briefly to the study that you made. Your finding, as I saw your testimony on this subject, was



that the—this was after you made the study—that "The evidence did not support and perhaps contradicted it," referring to Dr. Backman's hypothesis. A. Yes, sir.

Q. Now I would like to examine briefly with you some of the things that you did in connection with that study.

As I understand it, you compared average union rates in two cities in the State of New York that you selected, [1189] right? A. Average real union rates, that is deflated by the Consumer Price Index for each city.

Q. The point is, it was two cities you selected in New York State. A. There were only two states for which we had only real union wage rates.

Q. Only two cities, you mean? A. Yes.

Q. And you did this for five out of 343 industries; is that right? A. It was the only one for which the data are available on union wage rates.

Q. These industries, five out of 343? A. Yes, sir.

Q. And you did it, your comparison, with 20 cities which you selected? A. No, sir. We selected the other cities in the comparable class, and in this case the other cities that had Consumer Price Indexes so we could get real wage rates, and union wage rates.

Q. Well, take a city like Newark, for example, does that have a Consumer Price Index? A. Well, no, I don't think so, sir. Consumer Price Index is for New York and north- [1190] ern New Jersey, and I don't know whether Newark, it is probably included within that.

Q. You are not sure? A. I am not sure. Well, I am pretty sure that Newark is included in it.

Q. At all events, out of how many cities that were reported in this BLS survey were the 20 selected, do you

know? A. Well, I selected all cities that had union wage rates and Consumer Price Index.

Q. I am looking for a number, Dr. Kuhn. A. I think it is 20—

Q. 20 out of how many? A. 22 or 23.

Q. Out of how many? A. Well, that is the total, that is all the industries with Consumer Price Indexes that we have.

Q. About 20 out of how many cities that were reported on in this survey? A. I am sorry, I don't understand.

Q. Well, you handed us a BLS book, didn't you? Didn't you? Labor Statistics, 1975 Reference Edition Handbook? A. They are for a number of cities.

[1191] Q. Dr. Kuhn, what I am trying to find out from you is, of the total number of cities that were reported on in this volume, how many of them were omitted because as you say they didn't have cost of living indices reported. A. I would have to count them. I didn't count them.

[1192] Q. There were however, straight time earnings available? A. Yes, sir.

Q. For the 343 industries, were there not? A. Yes, sir.

Q. Those you did not resort to in making your comparison? A. Well, I did check out in looking at Perl's industry classification, I did check out the 3 that were at a significant level and one of which was the non-electrical machinery, if I remember right.

Q. I'm talking about your study. Dr. Kuhn, let's try to keep this simple:

In your study you selected five industries out of 343, didn't you? A. I selected all the evidence that was available.



The Court: Is that five industries?

The Witness: Five industries.

Q. That is what the produce of your study emanates from, your comparison of these five industries? A. Five industries in two cities.

Q. In the two cities, within the two cities which you say have cost of living indices? A. I think it is 22.

[1193] Q. Now, the report tells us that the averages which you compared the Buffalo and New York City with were influenced by the ratio in the printing trades of journeymen to the semi-skilled workers; do you remember that footnote? A. Yes, sir, and they are two occupational classifications.

Q. But the survey, or this booklet, does not weight the average to reflect the effect of the ratio in each city of the semi-skilled to the skilled, does it? A. Not in printing, no, sir. In transit—

Q. No, I am talking about printing.

That is the one that has the footnote. A. No.

Q. Now, let's go a little further with this study. The study did not take into account any fringe items whatever, did it? A. No, sir.

Q. You didn't ascertain the cost over the years of fringe items in New York City or in Buffalo, did you? A. No, except from general knowledge that we know—

Q. Never mind general knowledge. We are talking about the study that you produced here in court. A. That was a consideration which I did think about.

Q. I didn't ask you if you thought about it. I asked you [1194] did you evaluate the fringes or the cost of fringes in settlements in New York City and Buffalo over the

period of years covered by your study? A. There is no such information available to my knowledge.

Q. All right. And there is no such information available as to the cost of fringes included in settlements outside New York City, is there? A. That's right. So one cannot draw any conclusion.

Q. So to that extent you couldn't make a comparison. A. That's right.

Q. And your study does not purport to make one? A. No, it does not.

Q. All right.

Now, in New York City, are you aware that the public employees enjoy especially bountiful or liberal fringe benefits, in New York City? A. Yes, sir. I am a taxpayer.

Q. And don't you envisage that where these public employees work side by side, in similar occupations with people in the private employ, the benefits that are being enjoyed in the way of fringes in the public employ are influencing the demands of the unions and what they are getting in the private sector in the way of fringe benefits [1195] in New York City? A. No, sir. I would be very careful on that, because some of our low wage industries, such as garments, does not appear to have moved in that direction.

Q. Well now, Dr. Kuhn, instead of singling out a single example like this, I couch my question in general terms to ask you whether the level of fringe benefits enjoyed by public workers in New York, in your opinion as an economist, has a bearing upon the demands being made by unions for fringe increases in workers in the private sector in comparable employment and whether in fact it has had a bearing? A. I do not think it has because I have done



a study of local wages in New York City, for government employees, and the gap between public employees and the private sector appears to have grown, and it may well have grown and I would guess probably did for fringe benefits as well.

Q. Well now, you understand very well that I wasn't asking you about wages in the public employ, didn't you, Dr. Kuhn? A. Yes, sir.

Q. And you just told us that your statement about fringes amounts to a guess on your part? A. Yes, sir, because there is no evidence.

[1196] Q. Well now, I'd like, as far as possible, to explore with you and try to finish the exploration on what your study produced, not what you guessed at.

Now, can we take it between us, for an accepted fact, that there has been—withdrawn.

Did your study take into account clauses in contracts in and out of New York City, such as clauses bearing on direct productivity or increased productivity, which have a direct cost bearing but which are not expressed in dollars and cents so as to reach the averages which you were comparing? A. I don't see how they would influence the averages, Mr. Benetar.

Q. Well then I will break the question down.

Did you take into account in your studies clauses won in collective bargaining, either inside New York or outside New York, which represent increase in costs but are not expressed in terms of dollars and cents? A. No, sir, I did not.

Q. Now, do you recognize on the fringe question that the hospital workers of New York enjoy better fringes than elsewhere? A. Than other hospital workers?

Q. Yes, or than other workers generally, that they enjoy [1197] an absolute higher level of fringe benefits? A. No, I do not know that, and I would be skeptical of that.

Q. I don't wish to pursue it any further with you if you don't know it. If you knew it, fine.

What percentage of settlements, what percentage might fringes represent in wage settlements? A. You mean in wage costs for a firm?

Q. All right, in wage costs. A. Well, somewhere between 20 and 30 percent.

Q. All right.

Now, can we take it for granted, between us, that you recognize there was a lag in the economic climate in New York, and particularly during the last ten years? A. Yes, sir.

Q. We have had a loss of population, right? A. Well, in the private sector, sir, not in the public sector.

Q. All right, in the private sector; right, that's what I'm talking about. We have had a loss of manufacturing employment, we have had a loss in personal income.

Now, does your study take into account the lagging economy in New York by weighting any of the figures, [1198] especially for the last ten years? A. No, sir.

Q. Might the lagging economy, Dr. Kuhn, in your view, retard the rate of increases here in the City of New York? A. Yes, I think that would be possible. Then they would show up as some difference from Buffalo.

Q. Well, do you know whether Buffalo, too, as a city in the State of New York, has also lagged behind the national economy? A. I do not know the details of it. I suspect it has.

Q. So do I.



Mr. Benetar: Your Honor, I think this will be my last subject, if your Honor please.

Q. If there were a way of weighting the New York City figures, averages, to take into account the lag, would that in your opinion affect the comparative figures? A. Well, I guess I would want to weight both sides of the comparison. If I took it into account for New York and Buffalo, then I would want to choose those cities that have data available that also have lagged economies and then make those comparisons.

[1199] Q. We just don't have that information from your study, do we? A. No, we don't.

Q. Dr. Backman has said that unemployment insurance has a bearing on the duration of strikes in two ways:

He said they bring earlier settlements, or tend to bring earlier settlements, in some cases, and tend to increase the settlement somewhat and also to increase the strike's duration.

In the article of Ashenfelter and Johnson to which you referred in connection with your direct testimony, they tell us, do they not, that at or about the time of the expiration of a contract, the employer has a choice between giving into the last union demand, which is the wage increase the rank and file find acceptable as of the day of contract expiration—the choice of doing that or taking a strike in order to obtain a lower settlement. Do you recall that? A. Yes, sir.

Q. In effect, they are telling us here, are they not, that at the verge of a strike the employer has the choice of accepting a larger amount, which he must weigh against

whether he can reduce that amount if he stands for a strike, isn't that true? A. Yes.

[1200] Q. And if he in fact accepts the union's wage demand before the strike commences, then he will be settling for a larger sum than if he were able to or did in fact permit a strike to occur and then, in the end, win the strike? A. That is the hypothesis that they put up to test, Mr. Benetar.

Q. I am asking you as an economist whether you would see that the choice the employer has is to accept the union's last wage offer before strike or to put the matter to a test of a strike which if he loses he has not only lost the strike, but he is also going to pay more than he wanted to, whereas if he settles, he will be taking the union's last offer before the strike. A. That is not the hypothesis that Ashenfelter and Johnson sought to test.

It is interesting that the testing showed there was a very high negative correlation between the previous increase in real wages and the settlement or the demand or the strike.

Q. Let's see how their study goes on that subject.

At page 172— A. Could I have a copy, please?

[1201] Q. You mean of your book? A. Oh, oh, of my book.

Q. Page 173, and we will come to theirs later. Look at page 173. I call your attention to the statement in the first complete paragraph, about halfway down:

"The employer's estimate of how long his employees will submit to their loss of wages will partly determine his estimate of the duration of the strike and consequently the cost to him of rejecting the union's terms."

Do you see that? A. Yes, sir.



Q. That is from your book, isn't it? A. Yes, sir.

Q. From this, Dr. Kuhn, may we not draw the conclusion that employers estimate how long their employees are apt to hold out if he lets a strike occur? A. Will partly determine his estimation. It says nothing about what actually does happen.

Q. All right, will he estimate it? A. He will partly estimate it on this basis.

Q. Well, if you were called in by a company on the verge of a strike, as an economist, and they said, "We would like you to review the factors we ought to take into account in deciding whether to settle higher now or try for a lower amount later"; would you advise them to estimate the [1202] duration of the strike, the probable duration? A. Yes, I think that would be a wise move to make.

Q. So do I. In doing so, Dr. Kuhn, would you ask them the question, "Are your employees entitled to unemployment insurance?" A. Yes, I think it would be one of many of the factors that might be considered.

Q. And if they answered "Yes, our employees will be entitled to unemployment insurance," in one case and they answered "No," in the case of another employer in another situation, would you estimate the duration of both strikes identically—I mean, the proposed strikes? A. I think you would have to look to the issues on not on that basis—

The Court: We have to assume everything else is equal.

The Witness: If you assume everything else is equal, then your answer is implied in your assumptions.

The Court: Well, what is the answer?

The Witness: If the only thing that can affect the outcome is the unemployment insurance, that is, you already

assume that the strike is going to be longer than 8 weeks, then of course that becomes a factor to take into consideration; but how do you know it is going to be 8 weeks?

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[1203] The Court: You are being asked to give your opinion to an employer and would you give a different view if he said, "There is compensation available" as opposed to if he said "There is no compensation available" as to the possible duration of the strike.

The Witness: I think this is the problem the advisors would be faced with:

If it were an issue over which one would expect a short strike, then the unemployment insurance is irrelevant. If it is a very intractable issue, then it is going to be a long strike and it would be one of many factors considered.

There may be an intermediary case of 4 to 5 weeks where it might have a marginal influence and then you would have to look at other factors to see if it might come over to the tipping point and it would not be unemployment insurance in and of itself, but it would be one of many factors to help you determine the length and duration of strikes in the intermediate situation.

Q. Let's talk about a strike where the issue is one on which the parties are intractable. Would your estimate of the probable duration be the same to the employer who is [1204] in the state where no benefits are made as it would to the employer where unemployment benefits are paid? A. Yes, I think it would be—

Q. Would be the same? A. I would say that one could not estimate any differences in duration in that situation.

Q. Even under intractable positions and tough issues,



some day a strike has to get settled, doesn't it? A. They almost always have, yes, sir.

Q. Sooner or later? A. Right.

Q. And the answer to the question of whether it is going to be settled is whether it hurts one of the parties so much that he or it can no longer continue the struggle? A. No, sir. Referring to the chapter of my book on bargaining power, there is a whole plea for not considering the issue in that sort of simplistic terms. Is the cost of agreeing together—

Q. We are not talking about costs, we are talking about the intractable kind of issue— A. It is the creativity in coming up with a solution to the problem rather than how long they can bear it out.

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[1212] The Court: But do you say that the fact that they are getting half their pay tax free is of no effect at [1213] all.

The Witness: Well, I don't think I would want to say it has no effect. We certainly do not know or see any evidence of what effect it has.

The Court: Obviously then you concede it has an effect.

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The Witness: One among many.

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Q. I was asking you, I had asked you whether employers estimate the probable duration of strikes. In your experience do employers take into account whether or not their employees are going to get unemployment insurance in making their estimates? A. In the discussions I have had with management people, they have never mentioned this explicitly, but I presume that they might well do so.

[1214] Q. If you were called in by a management firm at the verge of a strike or after it had run for five or six weeks, you would surely inquire into that subject, would you not? A. Well, there would certainly be no reason not to do it.

The Court: I think he would say yes, because he said he would do it before a strike started, so I assume you would do it after a strike started.

Q. Do unions also estimate their staying power before embarking on a strike? A. Well—

Q. Estimate how long they can probably hold out? A. I think they would try to estimate.

Q. And in making those estimates, do the unions take into account whether or not their employees, or rather their members, are going to get unemployment insurance? A. They certainly say they do.

Q. Now, in the book, the article by Ashenfelter and Johnson—have we got a clean copy of this, because you may want to look at this (handed to witness)— A. What page?

Q. Turn to page 40, would you?

Look under that paragraph B, An Operational Formula-
[1215] tion of the Bargaining Model. A. Yes, sir.

Q. All right. You see they say there—by the way, I think I have already pointed out, that was the article that you mentioned in your direct testimony. I did point it out.

"From the analysis of a typical firm's choice between incurring and not incurring a strike, it was concluded that the parties were less likely to agree prior to conflict the greater the acceptable wage increase," and they give that a symbol, "and the speed at which the members' expectations are reduced during a strike."



Do you see that? A. Yes, sir.

Q. And that latter factor, the speed at which the members' expectations are reduced during a strike, is given the symbol Tau, right? A. Yes, sir.

Q. Now, in explaining what the authors mean on the same page by their reference to the speed at which the members' expectations are reduced during a strike, they say, do they not, "Tau, for example, should depend upon the size of benefits generally paid out of strike funds, how much unemployment compensation may be paid strikers, [1216] etc., all of which are institutionally determined."

Do you see that? A. Yes, sir.

Q. And do you also see, on page 40, the statement toward the bottom: "Second, the leadership will be less likely to reduce YO"—that is the initial demand— A. I am sorry, where is that?

Q. Toward the bottom of page 40 on the right-hand side. A. I see it.

Q. "Secondly, the leadership will be less likely to reduce YO when unemployment is low because the unemployment effects of a large wage increase will have little effect on their political stature and sizeable strike funds may replace part of the workers' lost income."

Do you observe that? A. Yes, sir.

Q. Now, do you observe that these authors feel that the speed at which a membership's expectations are reduced are influenced, that is, after a strike starts, are influenced by the size of benefits paid both out of strike funds and out of unemployment insurance? A. No, sir.

Q. Do you see them say that? A. I see them say that [1217] as a hypothesis.

Q. Well, did you see that they say, "It seems plausible to argue"? A. That is right, they are setting up a plausible hypothesis to test, and the last part of the article is to test that hypothesis.

Q. All right. Now, when we get to the conclusion, we find that what they have said is, "Although we are not firmly wedded to the precise estimates presented in this paper"—A. Excuse me, what page?

Q. Page 47. I'm sorry. A. Yes, sir.

Q. Got it? A. Yes, where?

Q. Under "Conclusions." A. Yes.

Q. "Although we are not firmly wedded to the precise estimates presented in this paper, it seems that the aggregate level of strike activity is behaviorally related to the degree of tightness of the labor market and previous rates of change of real wages. Among the implications of our analysis are the following:"—and now going down toward the bottom of page 47:

> [1218] "Other Institutional Changes. For example, the payment of unemployment compensation to strikers could be investigated."

A. Yes, sir.

Q. Now, Dr. Backman, in his testimony, and in the exhibits which we submitted here, have offered to the Court our investigation on the subject of unemployment insurance as it came from the mouths of the union involved here, from the mouth of the company, from the mouths of other unions, from the mouths of independent industry, from the mouths of public commentators. Did you pick up this investigation point in their article and conduct a study specially directed to this unemployment insurance? A.



Well, yes, I did. It was the picking up of Dr. Backman's hypothesis to investigate the effects of unemployment compensation, as Ashenfelter suggested.

Q. No, I am asking whether you, in the year that you have been in this case— A. No, sir, this is why I said Dr. Backman was very inventive.

Q. —made a study other than your attack on Dr. Backman's hypothesis? A. No, sir, I do not see that as an attack. I saw that as a test of his hypothesis.

[1219] Q. Did you see it as a confirmation? A. No, sir, I did not.

Q. I am asking you, did you pick up, in view of what these authors say about the rate of expectations declining, and they are pointing to unemployment insurance, did you pick up this suggestion and conduct an independent study? A. I did not conduct an independent study but I did examine the materials that Ashenfelter presented and tried to play around with different shaped curves, the V curve, and to see what kind of answers and conclusions I could come out with.

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[1219] Redirect Examination by Mrs. Marcus:

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[1220] Q. The union would, if necessary, have asked that the half million members of the union who were working and not on strike pay one dollar a week as an assessment, if that would become necessary? A. Yes, I heard that.

Q. Is that the kind of resource which might be available in strike situations, where there is a national union involved? A. Certainly one important source.

Q. Now, I believe you also heard the testimony of Dr.

Backman, and at page 390 he was asked about prior testimony that he had given, and he was asked about his statement, "Approximately one-third of the households in America are estimated to have two or more persons in the labor force," and I am asking him this question now, "And you said on the average there are about 1.43 persons in the labor force per household, and applying it to steel workers you said if the average indicated above also applies to steel workers it seems clear that the average earnings of these families would exceed the BLD budget by a wide margin," and Dr. Backman said, yes, that was still true today, so we would have a third of the families' labor force have an- [1221] other working member as well as themselves, and even those who don't, even the average household, not just that third, would have 1.43 members, so that would those, would that be another source of income? A. Yes, that becomes an important resource to support the family.

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[1227] A. Well, if a strike goes on for 8 weeks, I would conclude that it is a very intractable issue in dispute.

Q. Why would you so conclude? A. Because the workers will not be able to win enough in any kind of reasonable possible settlement to make it worthwhile in purely monetary terms. . . .

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[1234] Testimony of LEWIS J. PERL; Direct Examination by Mr. Benetar:

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[1245] A. It is my view that the data provides support for the hypothesis that unemployment compensation influences the collective bargaining process, it produces a different pattern in states paying it than in states not paying it.



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[1277] Cross Examination by Mrs. Marcus:

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[1298] Q. Please turn to your Table 407.

Is this not the same analysis as your Table 369 but now for a ten year period instead of a five year period? A. Yes, it is.

Q. And you served this after receiving Defendant's Exhibit 113-1 with the same information, is that correct? A. I don't know when the exhibits were served, but yes, I guess the answer to that is yes.

Q. Please look at the first line on that Exhibit 407. The mean length of all strikes.

Are New York strikes of shorter average duration than those in all other states? A. All strikes? You are referring to all the strikes?

Q. Yes, the first line. A. Yes. 3.5 weeks for New York [1299] versus 3.6 weeks for all other strikes.

Q. Are Rhode Island strikes of longer duration than those of all other states? A. Yes.

Q. Then for all strikes, New York is shorter than all states and Rhode Island is longer, is that correct? A. That's correct.

Q. Please look at the first line under strikes of eight weeks or less on the same chart, 407. These are the mean duration of strikes of eight weeks or less. A. Yes.

Q. Are New York strikes of shorter duration than those of all other states? A. Yes, that's correct.

Q. And are Rhode Island strikes of greater duration than those of all other states? A. Yes.

Q. For strikes of eight weeks or less New York is shorter than all other states and Rhode Island is longer? A. That is correct.

[1300] Q. Is the difference between New York and Rhode Island in mean length of strikes under eight weeks statistically significant?

• • • • •

[1301] The Court: Dr. Perl, do I recall accurately from your direct testimony that you and counsel for the Phone Company here do not urge upon me to draw any great conclusions from the first two? Is it only from the third set of figures, the 17.4 as opposed to 15.0?

The Witness: There are two numbers on that table which we direct your attention to. One is the percentage of all strikes being settled in the first eight weeks, the second is the mean duration of those strikes which last more than eight weeks. All the other figures that are on the table are there for completeness and I do not think they have any meaning at all.

• • • • •

[1303] A. . . . Yes, I would think that the difference between New York and Rhode Island—that you have accurately portrayed and it is probably statistically significant.

[1304] Q. Please look at the bottom group on the page, strikes of more than eight weeks. A. Yes.

Q. Are the New York strikes longer than those in other states? A. Yes.

Q. Are Rhode Island strikes of shorter duration than those of all other states? A. Yes.



Q. For strikes of more than eight weeks, New York is longer than the other states and Rhode Island is shorter? A. Yes.

Q. Is the difference between New York and Rhode Island in mean length of strikes over eight weeks statistically significant? A. Let me take my own calculator. If you have already computed the standard error and would tell it to me, I would probably accept it.

The Court: The difference between 17.4 and 14.7 corrected for standard error?

The Witness: Yes.

A. Yes. That is statistically significant at certainly a 1% level.

[1305] Q. Please look at the bottom line on Table 407 of this group which shows the percentage of all strikes which had a duration in excess of eight weeks. A. I beg your pardon?

Q. Look at the bottom line, the bottom group which shows the percentage of all strikes which had a duration in excess of eight weeks. A. Yes.

Q. Do you see that line? A. Yes.

Q. Is it not shown here that the percentage of strikes lasting more than eight weeks is smaller for New York than all other states? A. Yes.

Q. And the corresponding percentage of strikes is larger in Rhode Island than in all other states? A. Yes.

Q. Am I right that this is the complement of the last line in the middle group which shows, does it not, the percentage of strikes of less than eight weeks is greater in New York than other states and smaller in Rhode Island than in other states? A. That is correct.

Q. Therefore, in each of the mean statistics on this chart [1306] 407, New York and Rhode Island behaved differ-

ently from each other, so differently that where New York is smaller than the rest of the country, Rhode Island is larger and where New York is larger than the rest of the country, Rhode Island is smaller; is that correct? A. Well, I think deciding what Rhode Island is like—

Q. I am asking you what the numbers say. Is that what the numbers say or is it not? A. The means for Rhode Island for most of these statistics we are looking at—

Q. Please answer not the question you wish I ask you, but the one I did ask.

I ask you whether the four sets of figures we just referred to in each case where New York is larger and Rhode Island is—

The Court: Whatever it says, it says.

Mrs. Marcus: It is a foundation for the next question.

The Court: You have your foundation in the exhibit. So go ahead with the next question.

Q. However, the purpose of preparing these comparisons was to show that New York was different in strike length from states that did not have a UI representing unemploy-
[1307] ment insurance laws like ours, is that correct? A. That is correct.

The Court: Dr. Perl, what this exhibit does, if I understand it, this exhibit is merely a reduction in a certain form of statistical material, it is not more than that?

The Witness: That is right.

The Court: It has nothing to do with the size of the state, the area of marketing, the numbers of workers or anything. It is just the statistical reduction of material that you have gotten as an input and this is the output?

The Witness: Yes.

• • • • •



[1369] SAMUEL B. RICHMOND, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mrs. Marcus:

Q. Dr. Richmond, where are you employed? A. I am employed at Columbia University.

Q. In what capacity? A. I am a professor of economics and statistician at the Graduate School of Business.

Q. Can you summarize your educational background? A. I have a bachelors degree from Harvard University in 1940. Master of business administration from Columbia University in 1948 and a Ph.D. from Columbia University in 1951.

Q. Can you summarize your previous employment? A. I have been at Columbia University for thirty years. That covers a great part of my working life.

• • • • •

[1370] Q. Have you been a member or officer of any professional organization? A. I am a former director of the American Statistical Association and chairman of the American Statistical Association's advisory committee to the Civil Aeronautics Board besides the American Statistical Association, member of the American Economic Association, the Operations Research Society of America and the Institute of Management Sciences and I am on the Board of Trustees of Ramapo College in New Jersey.

Q. Have you been a consultant to any organizations? A. Yes, I have.

Q. Can you name a few of them? A. Yes. The Coca-Cola Company; Intercontinental Marketing Services which

operates throughout the world; the duPont Company; United Fruit Company; Eastern Airlines; Thomas J. Lipton; the Federal Aviation Authority; United States Department of Commerce; Tele-Prompter Corporation; the New York City Housing Authority; the American Society of Composers, Authors and Publishers; the Association [1371] of Industrial Advertisers; the City and County of Denver; the City of Dallas, Texas, the New York Telephone Company; United States Department of Agriculture.

Q. Have you ever been a consultant to a union? A. No, I have not.

• • • • •

Q. Are any of these relevant to the matters to which [1372] you will be testifying? A. Yes. Particularly the book Statistical Analysis. That deals with statistical techniques and that is what I shall be testifying about.

Q. Is the book Statistical Analysis used in universities? A. Yes. As a matter of fact, it has been used in more than 250 universities in the United States and the world, including Canada, Mexico, South America, Puerto Rico, South Africa.

Q. And the book Operations Research for Management Decisions? A. That is somewhat newer. It hasn't had quite the distribution but it has been used in about 160 universities throughout the world.

Q. Are any of your publications related to labor economics? A. Yes. One entitled Manpower For Aviation.

Q. Have you taught labor economics? A. I have taught labor economics as part of general courses in economics which I have taught. I have taught three general courses in economics which did have that as part of it.



Q. Do you specialize in labor economics? A. I do [1373] not.

Q. What is your specialty? A. Statistical techniques, statistical methodology.

• • • • •

[1377] Q. Did you hear the testimony of Dr. Lewis Perl? A. Yes, I did.

Q. Are you familiar with his hypothesis as expressed at Pages 1239 and 1240 and 1285 that the payment of unemployment compensation to strikers causes employers to settle strikes earlier to avoid such strikes reaching the eight week period and tends to make strikes of over eight weeks become longer than they otherwise would? A. Yes.

• • • • •

Q. Do you agree with Dr. Perl's testimony which appears in the transcript at 1245 that Exhibit 407 provides support for the hypothesis that unemployment compensation "produces a different pattern in states paying it than in states not paying it"? A. No, I do not.

[1378] Q. Why do you so conclude? A. Because we have two states which have the law and these two states, as has been brought out earlier, behave differently in every one of the various opportunities that the states have to behave either similarly or differently.

With respect to the mean length of all strikes, to the mean length of the shorter strikes, less than eight weeks, the mean length of strikes longer than eight weeks, and the percentage of strikes that are short.

In each of these cases, whichever one state does, the other does the opposite with respect to the average or the whole of the United States so I find that this is not at all con-

firmatory of the hypothesis but rather I find it quite the opposite.

• • • • •

Q. Do New York and Rhode Island differ from each other in these four categories to a statistically significant extent? A. Yes. In two of these categories, two important categories, the mean length of strikes of eight weeks and [1379] less, there the mean length for New York and Rhode Island, those two means differed significantly at the one percent level and as was brought out in the testimony for the strikes of more than eight weeks, the mean length of New York and the mean length of Rhode Island differed significantly at the one percent level.

Q. Dr. Perl also testified at Page 1243 that there were only 350 strikes in Rhode Island during the period of this data and only 46 which lasted more than eight weeks.

Dr. Richmond, can you tell us whether 46 is considered by statisticians to be a small sample? A. No, it is not.

• • • • •

Q. Doctor, can you describe the distinction between a [1380] large and a small sample? A. Yes. Generally in statistics in my book and in just about any other book in statistics, one will find that thirty is the dividing line between a small sample and a large sample.

Q. Are smaller samples, that is now smaller than thirty, used in statistics? A. Indeed they are. As a matter of fact, that is why statisticians differentiate between small samples and large samples because in many procedures with the small samples, different techniques are used, but that does not mean that useful and valid and important



results cannot be and are not obtained from these small samples.

Q. Dr. Richmond, do you agree with Dr. Perl's statement that the Rhode Island data represents so few strikes that the best way to read the data for New York and Rhode Island is to combine them? A. No, I do not.

• • • • •

[1383] Q. Please turn to Defendants' Exhibit 122-A, that is, the table prepared by Dr. Perl entitled "Analysis of Strikes Lasting More Than Eight Weeks in Rhode Island and New York Compared to the Rest of the Nation".

This table has some of the additional statistical information suggested by the Grinnell decision. A breakdown of strike lengths by industry as well as by state; is that correct? A. Yes.

• • • • •

[1385] A. . . . .[T]he average for all of the industries is at the bottom, 14.80 weeks.

Now, for the individual industries, some will be longer and some will be shorter than the 14.80.

• • • • •

This is the important fact to which I would like to point and that is that the strikes that tend to be longer in the other states, those with the pluses, tend to be those which are shorter in New York and Rhode Island than they are in the other states.

Now, this is contrary to the hypothesis. The hypothesis is that long strikes, longer strikes tend to become longer because of the UI and here we find the longer strikes are indeed those that are shorter in New York and Rhode Island [1386] than in the other states.

So I think that's a very important factor and this turns out as extremely statistically significant.

• • • • •

The Witness: . . . What I am showing here is that there is a very close relationship here and that those industries which have long strikes throughout the nation are the very ones which tended to have shorter strikes in New York and Rhode Island than in the rest of the nation.

• • • • •

[1387] Q. You found it to be statistically significant? A. It is indeed statistically significant and I find it to be contrary to the hypothesis that we are all talking about. I offer no alternative hypothesis.

Q. This was true even with the New York and Rhode Island results combined, is that correct? A. Yes, it is, but you can see on the work sheets 122-B, C and D, that if you were to remove Rhode Island, it would be essentially virtually the same.

• • • • •

[1388] Q. For New York? A. Yes. If you looked only at New York, you will find that the results are virtually the same.

• • • • •

[1391] The Witness: . . . [T]he longer strikes in New York could be due to an infinite number of hypotheses. We have one hypothesis here that is being tested. The hypothesis that it is due to UI fortunately we have two states in which the UI laws occur and we find the data opposite in these two states.

• • • • •



[1399] A. . . . I reject the combining of New York and Rhode Island because this has the effect of submerging the Rhode Island data and causing us to lose exactly what we are looking for, namely, any evidence of a common pattern.

• • • • •

[1401] A. In this case there was a hypothesis clearly stated and the causal factor was clearly identified and this then was in a configuration which made it possible to examine data and see whether the data Dr. Perl used would confirm or discredit the hypothesis. The data were developed. We looked at the data and we did not confirm the hypothesis.

This leads me to conclude this must have a very destructive effect on the hypothesis of causality.

• • • • •

[1403] Q. . . . [Y]ou testified as to what happened in those industries in New York. Did that analysis of the New York data alone also relate to what you just said about the lack of causal connection? A. Yes. I think that was a very meaningful analysis. That is, the one we went through at some length on Exhibit 122A where we showed that those industries which tended to have long strikes throughout the nation, tended to have shorter strikes in New York and Rhode Island than in the other states.

• • • • •

. . . [I]f you were to look at just New York and not Rhode Island, the results would be identical.

Q. And you found the same from the work sheet referring to New York alone? A. Yes, I did that.

• • • • •

[1443] By the Court:

Q. Why is the hypothesis damaged because there are some strikes that are longer than the average where New [1444] York happens to be shorter than they are? That is what it boils down to. Having some strikes that nationally are longer than the average but New York happens to be shorter and why does that prove anything and if it does, what does it prove? A. Well, it didn't happen in just one case. It happened in many more cases than could happen by chance and I don't know what it proves but I know what it discredits.

It discredits an assertion that those strikes that tend to be long elsewhere are longer in New York.

• • • • •



SUPREME COURT OF THE UNITED STATES

No. 77-961

NEW YORK TELEPHONE COMPANY, *et al.*,

*Petitioners,*

v.

NEW YORK STATE DEPARTMENT OF LABOR, *et al.*

Order Allowing Certiorari. Filed March 27, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

Supreme Court, U. S.
FILED
FEB 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

*against*

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENTS IN OPPOSITION

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In the

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-961

New York Telephone Company, Western Electric Company, American Telephone & Telegraph Company, Long Lines Department, and Empire City Subway Company (Limited),

*Petitioners,*

*against*

New York State Department of Labor, Louis L. Levine, Industrial Commissioner of the New York State Department of Labor, New York State Department of Taxation & Finance, and James H. Tully, Jr., State Commissioner of Taxation & Finance,

*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

## BRIEF FOR RESPONDENTS IN OPPOSITION

### Question Presented

Whether, in view of the expression of national labor policy by Congress in the National Labor Relations Act and the Social Security Act, and the repeated rejection by Congress of demands that the individual states be prohibited from paying unemployment compensation and other benefits to striking employees, the Court of Appeals for the Second Circuit correctly refused to create a judicial bar to the implementation of New York's unemployment insurance law as it relates to strikers?

## Statement of the Case

### (A) The Statute: Unemployment Insurance Law § 592.1

The "significant impact" which New York's law is alleged to have had on petitioners (hereinafter "Telco") in the forty years in which this statute has existed in substantially the same form, is the development of a single strike exceeding the statutory eight week suspension and waiting period. Petitioners contend that but for the availability of unemployment benefits in New York,* the Telco employees would have ratified the pattern contract negotiated in July, 1971. The facts rebut this assumption. In the numerous States** which provide for unemployment benefits during a strike where an employer (such as a telephone company) continues in substantial operation, the Bell System employees ratified the national contract. Employees in these other States would have been paid unemployment compensation from the outset. Yet it was the New York employees who were barred from such payments for the first eight weeks who voted to strike, while those whose states' unemployment benefit provisions gave them the greater advantage voted to accept the company's offer.

### (B) Financial Factors During the Strike

Although the Telco employees would have been eligible for unemployment insurance for many more months at the time of settlement, they agreed to a contract which was substantially the same as the one originally offered (Tr. 177-178). It differed from the wage increase in the original pattern settlement by a maximum of $1.50 *per week* for

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* The maximum, erroneously cited by the District Court as $95 weekly (Appendix to petition, 28a) was $75 per week (Trial Transcript, p. 776 [hereinafter "Tr."]) and even this was available only to employees whose base salary was at least $149 per week. Petitioners supply this Court (p. 6) with the expected maximum for September, 1978, but omit the $75 figure applicable during the strike.

** E.g. Illinois, Indiana, Maine, Massachusetts, New Hampshire, Vermont, Pennsylvania and New Jersey. Defendants' Exhibit 1, "Comparison of State Unemployment Insurance Laws," United States Department of Labor, Manpower Administration, Unemployment Insurance Service (January 1972) Table 405 (hereinafter "U.S. Labor Dept. Chart, Defs. Ex. 1").



some upstate employees in the top crafts (Tr. 105-106), and the Saturday differential pay was not substantial (Tr. 919). Indeed, Telco's own statement and outline drafted for the federal Wage Board after the strike described the settlement as follows: "All terms [are] generally identical with the pattern of those of other Bell System companies," and the slight additions to the pattern "are insignificant especially when one considers that their percentages are significantly reduced for the first year of the contract because of the seven months' strike." (Tr. 920-921 and Defs. Ex. 77).

Moreover, there was *no* financial pressure on Telco as a result of the strike. Dr. William Melody of the University of Pennsylvania* testified that the same instrumentality—the strike—acted in opposite directions to increase Telco's unemployment insurance tax while greatly decreasing its payroll expenses as it continued to receive revenues. Dr. Melody's "ballpark" (Tr. 710) estimate was that the total in wages not paid during the strike was $199 million for the New York Telephone Company and $231.5 million for the four plaintiffs combined (Tr. 705-706). The wages not paid by Telco summed to approximately $86 million *after* subtraction of overtime and other expenses incurred above the norm during the strike** (Tr. 709). This amount was greater than the benefits paid by an enormous margin.

### (C) The Statistics

Petitioners allege that the challenged provision has had a substantial and prohibited impact on strikes and settlements. This cannot be determined by assumption or by "truisms".

What are the statistics?*** New York has a *shorter*

---

* Dr. Melody has been an associate professor of communications economics at the School of Communications of the University since 1971, and prior to that (1966-1970) was a senior economist at the Federal Communications Commission (Tr. 690).

** The effect of the strike on revenues was very minor, according to Telco data (Tr. 701, 702, Defs. Exhs. 100, 104-106).

*** Respondents' statistics were presented by Dr. Samuel A. Richmond, a former Director of the American Statistical Asso-

*(footnote continued on following page)*

average strike duration than the average for other states (Tr. 1374, Defs. Ex. 113-A). Petitioners dealt with this by arguing that it is only strikes of over eight weeks which are "lengthened" because of unemployment insurance payments. However, the data for this category are equally unhelpful for petitioners' purposes. When strike duration statistics are analyzed by state *and industry,* the data show that the average strike duration for all industries in the over-eight-week group is 14.80 weeks (Tr. 1385). Those industries which in all other states had longer strikes than this average had *shorter* strikes in New York (Tr. 1403, Defs. Ex. 122-A).*

Thus, the data on behavior**—how long do employees in

*(footnote continued from preceding page)*

ciation and author of a leading text on statistical analysis. His study of the period from 1965-1974 rebutted petitioners' witness Dr. Lewis Perl's analysis of a five year period. Dr. Perl subsequently reported the same statistical results as to the ten-year data which had been set out by Dr. Richmond. Defs. Exhs. 113-A and 113-B. Dr. Richmond, Dean of the Graduate School of Management of Vanderbilt University, was at the time of trial a professor of economics and statistics at the Columbia University Graduate School of Business (Tr. 1370-1371). The District Court did not mention Dr. Richmond or his testimony in its opinion.

* Omitting the industry factor is a less exact method. *Cf. Grinnell Corp.* v. *Hackett,* 475 F.2d 449, 459 (1st Cir.), *cert. den.* 414 U.S. 858, 879 (1973). The results under this method, which was used by petitioners, also fails to support their claims. New York is sixth out of 50 in duration over a 10-year period (and virtually the same as the seventh state Virginia), and Rhode Island (whose statute is very similar to New York's) is 29th (Defs. Exh. 113-B).

** Petitioners submitted at trial an assortment of newspaper clippings, letters, and taped messages which they offered as views on unemployment insurance by union representatives or newspaper writers. As Dr. Mason Haire, professor of psychology and organization behavior in the School of Management of the Massachusetts Institute of Technology (MIT) concluded and reiterated on cross-examination, the great bulk of the material was not an exhortation to "do it, so that the strike will work" but "an administrative service to make sure that the things that are available were known to be available . . ." (Tr. 605, 654-655). An opinion survey presented by petitioners resulted in contacting only eight people who had ever been on strike (Tr. 460, 416). Dr.

*(footnote continued on following page)*



fact strike, what settlement levels are in fact achieved*—show that New York's law has no significant impact on the outcome of collective bargaining.

## Reasons Why Certiorari Should Be Denied

### I. The Petition Presents No Substantial Federal Question.

Petitioners urge that this Court exercise its certiorari discretion herein to "settle" matters of public importance (p. 14). While the issues raised in the petition may involve an interesting subject for debate, they present no substantial federal question and must therefore be debated in other forums.

A. This Court has issued a ruling which is squarely in point as to the preemption claims herein. In *Kimbell, Inc.* v. *Employment Security Commission of New Mexico,* 429 U.S. 804 (1976) an appeal from a judgment of the Supreme Court of New Mexico presented the question of whether the State's payment of unemployment benefits to strikers contravened the "federal labor policy requiring state neutrality in [the] collective bargaining process." (45 U.S.L.W. 3052, July 27, 1976). This Court did not find a Supremacy Clause violation, and dismissed the appeal "for

*(footnote continued from preceding page)*

Haire remained unconvinced that a public opinion poll that votes on whether unemployment insurance prolongs strikes is the proper method of arriving at the truth on that question (Tr. 610-611). "If I were charged somehow with determining the appropriateness of the New York State UI Law, I would certainly want to study the behavior rather than the opinions" (Tr. 603).

* Petitioners presented no data to show that settlements in New York are higher than elsewhere. Respondents' data was analyzed by Dr. James W. Kuhn, Vice Dean of the Columbia University Graduate School of Business. He testified that the wage trend in New York State over a substantial period of time was lower than the average for other states (Tr. 1030-1031, 1036-1037). His industry analysis of all the available data covered 9.52% of the industries in which strikes of over eight weeks occurred in New York, Rhode Island, and other states (Defs. Ex. 122A). Rhode Island also has "a clearly lower wage level for 'average gross hourly earnings'" than the other industrial states in the region (Plaintiffs' Exhibit 317, p. 12).

want of a substantial federal question." Such dismissals, unlike a denial of certiorari, are rulings on the merits of the appellants' claims. *Hicks* v. *Miranda,* 422 U.S. 332, 344 (1975).

Petitioners and movants would nullify the *Kimbell* decision entirely. Without the slightest explanation, they urge the unconstitutionality of the unemployment compensation law of Hawaii—a provision which is identical to that of New Mexico.* In their effort to obtain review of the decision below, they rely heavily (p. 12) on a District Court holding which struck down Hawaii's statute. *Hawaiian Tel. Co.* v. *State of Hawaii Dep't of Labor & Indus. Rel.,* 405 F. Supp. 275 (D. Hawaii 1976), *appeals docketed* (9th Cir. Mar. 19 and May 12, 1976, Nos. 76-1584, 76-2056), *petition for cert. filed,* 46 U.S.L.W. 3454 (January 4, 1978) (hereinafter *"Hawaiian Telco"*). Petitioners apparently believe that the District Court's decision supersedes this Court's holding in *Kimbell.*

Since such nullification of *Kimbell* would violate this Court's teaching in *Hicks* v. *Miranda, supra,* there are two alternatives remaining. Either *Kimbell* is controlling on all cases challenging the grant of unemployment compensation during strikes, as was held by the Third Circuit in *Super Tire Engineering Co.* v. *McCorkle,* 550 F. 2d 903 (3d Cir.), *cert. den.,* 46 U.S.L.W. 3215 (Oct. 4, 1977), *rehearing denied,* 46 U.S.L.W. 3437 (Jan. 10, 1978),** or it is binding only as to statutes utilizing New Mexico's approach—the granting of benefits if the employer continues to operate during the strike.***

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* Hawaii Rev. Stat. §§ 383-30, 385-7 (amended 1973); N.M. Stat. Ann. § 59-9-5(d) (amended 1975).

** The Court below did not find *Kimbell* controlling as to New York's statute, and therefore proceeded to examine and wholly reject petitioners' claims on the merits. Appendix to petition, at 7a, n. 2. (Hereinafter, all references to petitioners' appendix appear with suffix "a".)

*** As noted *supra,* petitioners not only continued to operate during the strike which forms the sole basis for their complaint, but enormously decreased their payroll expenses while revenues continued at substantially the same level. Tr. 705-706, 709, 710.



As will be shown below, there is no basis in federal law for petitioners' claims. This demonstrates that the decision cannot be confined to a particular statutory option.* Moreover, the limiting interpretation of *Kimbell* would not create the federal "uniformity" demanded by petitioners (p. 18). If *Kimbell* applies only to those statutes which are modelled along the New Mexico line, some state laws granting unemployment benefits to strikers will be protected while others will be subject to challenge as federally "preempted."**

The vast majority of states have repudiated the view that unemployment compensation must be withheld during industrial controversies, or should be paid only to employees who have been formally "locked out" by their employers.*** These states have established a considerable range of statutory schemes, of which New York's and New Mexico's constitute two options. Unless this Court's ruling in *Kimbell* constitutes "a rejection of the substantive contention that federal labor policy precludes such compensation"**** federal courts will be asked to

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* A footnote in *Ohio Bureau of Employment Services* v. *Hodory,* 431 U.S. 471, 475 (1977) cited by movant Rochester Telephone Company (at p. 16), is not to the contrary. While *Kimbell* dealt with the right of a State to grant benefits to strikers, *Hodory* dealt with the rights of undisputed *non*-strikers, idled by an industrial controversy in another state, to receive unemployment compensation. Moreover, the Ohio law affecting such employees was challenged on the basis that plaintiffs had an alleged substantive right to receive unemployment compensation "when due" under § 303(a) of the Social Security Act of 1935 and this Court's decision in *California Dept. of Human Resources Development* v. *Java,* 402 U.S. 121 (1971), and not on the grounds of labor law preemption.

** Indeed, movant Chamber of Commerce recognizes the anomaly inherent in such a situation (p. 4), but fails to recall that this Court's decision in *Kimbell* has *inter alia* already established the validity of benefit payments in the numerous states which have laws like New Mexico's. (U.S. Labor Dept. Chart, Defs. Ex. 1.)

*** Defs. Ex. 1. New York's law is unique in *barring* payments during the first eight weeks of an industrial controversy, thus eliminating 89% of strikes from the payment category completely. (Defs. Ex. 113-A.)

**** *Super Tire Engineering Co.* v. *McCorkle, supra,* 550 F. 2d at 908.

evaluate these diverse statutes to determine which are "best."

The subjectivity of this exercise would be endless.* Should States be allowed to pay if the dispute is caused by a hazardous condition?** The employer's failure to conform to his own collective bargaining contract?*** An employer's violation of the labor law?**** Should employees receive benefits if they are not in the grade or class financing the dispute or not directly interested in it, or have been laid off from a *bona fide* subsequent job?*****

While the District Court herein found New York's statute more violative of "federal labor policy" than New Mexico's law (51a-53a), the District Court in Hawaii determined after trial that Hawaii's provision (identical to New Mexico's law upheld in *Kimbell*) was intrusive because of features not present in New York's enactment (405 F.Supp. at 284):

> "By focusing on the *effect* of collective action by employees upon the employer's business operations when the parties are in the throes of a collective bargaining conflict, it impinges upon 'the very subject addressed by Congress in NLRA' and therefore is preempted, unless Congress has provided otherwise." (Footnotes omitted). (Emphasis added).

Such contradictions occur when courts are asked to make judgments which are essentially legislative in nature. Since,

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* Testimony by nationally known experts concerning statistics directly countering petitioners' theories (see pp. 3-5, *supra*), was disregarded by the District Court, which accepted a "truism" about the payment of benefits (28a, 38a).

** 26 Me. Rev. Stat. Ann. § 1193 (amended 1977).

*** E.g. W.Va. Code § 21A-6-3 (amended 1976);
N.H. Rev. Stat. Ann. 282:4 (amended 1973).

**** E.g. Ariz. Rev. Stat. Ann. § 23-777 (amended 1952);
Rev. Codes of Mont. § 87-106 (amended 1977).

***** Fla. Stat. Ann. § 443.06 (amended 1972);
Nev. Rev. Stat. 612-395 (1955);
Conn. Gen. Stat. Ann. §§ 31-236 (amended 1977), 31-236(a) (1969);
Ann. Laws of Mass. C-151A § 25 (amended 1976);
Mich. Comp. Laws Ann. § 421-29 (amended 1975).



as will be seen below, Congress intended to permit variations in State law as to the eligibility of strikers for benefits, the nature of that permission may not be altered by introducing a requirement that each variant be judicially approved.

B. This Court's decision in *Kimbell* and the thorough analysis of the merits by the Second Circuit effectively dispose of the substantive arguments raised in the petition. However, in view of the multiplicity of contentions proffered by petitioners and movants, further discussion may be of assistance to the Court.

Petitioners cite no provision of the National Labor Relations Act,* nor any material expression of congressional intent, to support their Supremacy Clause claims. The National Labor Relations Board, which has been charged by Congress with the duty of enforcing the NLRA, and the United States of America speaking through former Solicitor General Bork have come before this Court to state categorically:

> "The preemption issue initially turns on Congress' intent when it enacted and subsequently amended the National Labor Relations Act . . . and the Social Security Act . . . as amended by the Federal Unemployment Tax Act . . . The history of those Acts shows that Congress concluded that a uniform policy on the payment of unemployment compensation to strikers was not essential to the federal regulatory scheme, and thus elected to leave this matter to the judgment of each state."**

Contrary to the implication throughout the petition, the NLRA did not spring forth from its own separate and unique Congress. The original National Labor Relations Act (Wagner Act) and the legislation establishing a na-

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* Pub. L. No. 74-198, 49 Stat. 449 (July 5, 1935), as amended 29 U.S.C. §§ 151 *et seq.*, hereinafter "NLRA."

** Brief of Solicitor General Bork and the National Labor Relations Board filed at the request of this Court in *Kimbell, Inc.* v. *Employment Security Commission of New Mexico*, Docket No. 75-1452, *appeal dismissed*, 429 U.S. 804 (1976), at p. 5.

tional unemployment insurance program (Title IX of the Social Security Act of 1935)* moved through Congress during the same session. The Wagner Act was enacted on July 5, 1935, and the Social Security Act on August 14, 1935. In fact, Senator Wagner was a sponsor of both statutes.** The 1935 Congress, speaking through the Social Security Act, established a number of restrictions governing payments of unemployment compensation, some of which dealt particularly with labor-management problems such as the granting of benefits during strikes and lockouts.*** Congress did not, however, bar the payment of such benefits to strikers.****

The Senate Finance Committee Report on the Social Security Act of 1935, in explaining the legislative choice involved, stated unequivocally:

> "Except for a few [necessary] standards . . . the States are left free to set up any unemployment compensation system they wish, without dictation from Washington."*****

The subsequent efforts to introduce into Congress the restrictions on the States which petitioners are now seeking from the judiciary, are set out in detail in the decision below (13a-16a). In 1947, for example, the House enacted

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* Pub. L. No. 74-271, §§ 901-910, 49 Stat. 639-45, now the Federal Unemployment Tax Act, 26 U.S.C. § 3301-09.

** 79 Cong. Rec. 9283 (1935).

*** See e.g. Social Security Act § 903(a)(5), currently 26 U.S.C. § 3304(a)(5) of the Federal Unemployment Tax Act ("FUTA"), which provides *inter alia:*

> "(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:
>
> (A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;"

**** It should be noted that the New York statute predates the enactment of the NLRA and the relevant provisions in the Social Security Act of 1935, and that Congress was aware of the State's provision (11a-12a).

***** S. Rep. No. 628, 74th Cong. 1st Sess. 13 (1935); see also *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 593 (1937).



amendments to the NLRA which provided that strikers who received unemployment benefits would thereby forfeit their status and protection as employees under the Act. After a House-Senate Conference, the Senate revision which omitted that exclusion was accepted and passed (13a-14a).

Repeated congressional consideration of whether strikers should be disqualified from receiving various forms of public assistance resulted not only in refusals to enact amendments, but also in the passage of several important provisions (see point I [C] *infra*).* Petitioners' attempt to characterize this legislative history as "unconnected and isolated" (p. 21) signally fails to deal with the extensive material supporting the Second Circuit's conclusions.

Indeed, in *Ohio Bureau of Employment Services* v. *Hodory,* 431 U.S. 471 (1977), this Court rejected preemption claims under FUTA and the Social Security Act by considering precisely the same kind of legislative history as was cited by the court below. This Court analyzed (431 U.S. at 482 *et seq.*) Committee reports dealing with the subject, pertinent statutory provisions relating to payment of unemployment compensation to strikers, and more recent congressional amendments, and concluded:

> "[S]tudy of the various provisions cited shows that when Congress wished to *impose* or *forbid* a condition for compensation, it was able to do so in explicit terms." (Emphasis added). (431 U.S. at 488.)

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* Petitioners call this "congressional silence" (p. 23), despite testimony on the floor of Congress (see e.g. statements of the House Ways & Means Committee Chairman [14a]), pertinent reports from both Houses, and the enactment of bills which mandate the payment of benefits to striking employees. Their reference (n. 19, p. 23) to 2A Sutherland, *Statutory Construction,* § 49.10 at 261 (4th ed. 1973) is also inapposite, since that discussion concerns acquiescence or inaction by a Legislature as signifying *adoption* (not rejection) of a statutory interpretation.

It should be noted that this Court was guided by "[t]he fact that Congress has chosen *not* to legislate on the subject of labor dispute disqualifications" (emphasis added) in rejecting the preemption challenge posed in *Ohio Bureau of Employment Services* v. *Hodory, supra,* 431 U.S. at 488-489 (1977), which will be discussed further *infra.*

It is indisputable that Congress is similarly capable of requiring or prohibiting a condition for payment of benefits under the NLRA.

C. Petitioners argue that New York's unemployment insurance law is preempted by federal labor policy and violates the requirement of governmental neutrality in labor disputes. Neutrality is best defined by Congress, not petitioners.* New York's right to pay unemployment insurance to eligible strikers is not violative of national labor policy—it is the national labor policy. Petitioners ignore the obvious—that congressional intentions regarding labor relations are expressed in several different statutes, among them the Social Security Act, the Railroad Unemployment Insurance Act, and the Food Stamp Act.**

The Social Security Act provided a tax on employers in states which did not pass unemployment compensation laws, and therefore all the States enacted such statutes.*** Congress established certain mandatory standards governing payment of unemployment benefits during strikes but, as shown above, determined to permit—without requiring—the granting of such benefits to strikers. That permission is as much a part of the federal labor scheme

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* Congress has equated the *requirement* that food stamps be granted to strikers with the refusal "to take sides in labor disputes." H.R. Rep. No. 1402, 91st Cong., 2nd Sess. (1970), 1970 U.S. Code Cong. & Admin. News, pp. 6025, 6035.

** For example, the Social Security Act, *supra* at p. 10, requires payment of unemployment benefits to otherwise eligible claimants who refuse new work at the site of a strike; the Railroad Unemployment Insurance Act, Pub. L. No. 75-722, 52 Stat. 1094 (1938), as amended 45 U.S.C. § 351 *et seq.*, requires the payment of benefits to workers who participate in lawful strikes; and the Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703, as amended 84 Stat. 2048, 2050, 7 U.S.C. § 2011, § 2014(c) (1971), expressly provides that strikers are not disqualified from receiving food stamps.

*** 26 U.S.C. § 3301, § 3304. Yearly, the Secretary of Labor reviews, authorizes and certifies that each State plan complies with the mandate of § 3304. The Secretary has objected to some New York provisions, but not the industrial controversy provision (Tr. 766-768).



as is the NLRA's permission to resort to economic weapons.*

Thus, petitioners' reliance (p. 16) upon cases in the tradition of *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959) is misplaced.** In *Garmon* and its progeny, the state statutes at issue were unconnected with any federal program. Here, this Court is not presented with a preemption case but with a statute authorized by the Social Security Act and implemented by the State. See *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937) in which this Court, in upholding the constitutionality of the Social Security Act against a claim that it usurped State powers, observed that "a wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books" (301 U.S. at 593). This Court acknowledged New York's statute as well as those of five other states (301 U.S. at 587-588).

Understandably, petitioners have failed to explain how this case meets any of the requirements of a preemption

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* Petitioners argue (p. 22) that the State must prove that it has been explicitly authorized to enact the statutory option it has chosen. To the contrary, States do not need authority from the federal government to legislate. They have such a right unless an enactment is barred by a specific congressional prohibition. *Cf. Batterton* v. *Francis,* 432 U.S. 416, 429-432 (1977).

** This Court has defined two categories of cases in which it applies the principle of preemption: (1) "jurisdiction of the Board" as evidenced by *Garmon* and (2) cases which focus upon the question of whether Congress intended that "the conduct involved be unregulated and left to be controlled by the free play of economic forces." *Lodge 76, IAM* v. *Wisconsin Employment Rel. Comm'n,* 427 U.S. 132 (1976). This case does not fit either category, since the state action of granting unemployment benefits to eligible strikers after an eight week suspension and waiting period is an activity over which the NLRB has no jurisdiction, and is an activity which Congress intended the State to regulate. New York's unemployment insurance law, unlike the statute at issue in *Lodge 76, supra,* provides no power to "police" any of the parties to an industrial controversy. The State refuses to dictate any substantive terms in labor contracts.

case as established by this Court in its prior decisions.* Instead, upon the mere invocation of the term preemption, they ask this Court for an unprecedented and unwarranted restriction on New York's unemployment insurance program. This program was developed as part of a "cooperative endeavor"** by Congress and the various State legislatures, and has continued undisturbed as such since its inception.

### II. There is no Genuine Circuit Conflict on Which to Base a Request for the Granting of Certiorari.

Petitioners commence their "conflicts" claim (p. 10) with a holding*** which would be contrary to the Second Circuit decision herein. However, this holding was not that of the First Circuit in *Grinnell Corp.* v. *Hackett,* 475 F. 2d 449 (1st Cir.), *cert. denied* 414 U.S. 858, 879 (1973), the opinion on which petitioners' argument of circuit conflict is based. Instead, it is contained in the District Court opinion which was reversed by the Court below. While the petition underscores the differences between the Second Circuit's views and those of the District Court which were considered and rejected, the differences between the Second Circuit's opinion and *Grinnell* fall far short of providing a basis for the granting of certiorari.

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* *Nash* v. *Florida Industrial Commission,* 389 U.S. 235 (1967) is also invoked (pp. 19-20), apparently because it contains general statements that States may not pass an unemployment compensation law which "frustrates federal legislation." In *Nash,* Florida refused to continue payment of unemployment compensation to a person who had filed an unfair labor practice charge against a former employer. Section 8(a)(4) of the NLRA *explicitly* provides that it is an unfair labor practice for an employer to discriminate against an employee because he or she has filed charges. The Court held that the statutory rule in the NLRA prohibiting coercive actions by employers against anyone making charges also applied to the States.

** *Steward Machine Co.* v. *Davis, supra,* 301 U.S. at 587.

*** ". . . [T]he New York Unemployment Insurance Law, insofar as it grants unemployment compensation to strikers, (a) constitutes state intervention on their behalf, (b) tips the economic scales in their favor and (c) forces New York employers to subsidize lengthy strikes against themselves, all in conflict with the pre-

*(footnote continued on following page)*



The Court below found that relevant legislative history established the intent of Congress to permit States to determine the direction of their own programs in the area at issue, while *Grinnell* found that the intent was not clear. However, on the fundamental question of whether this area was federally preempted, *Grinnell* shared the Second Circuit's doubts. The *Grinnell* Court held that phase two of the District Court's inquiry, the State's interest in the unemployment scheme, would have to be ruled upon only if plaintiffs prevailed on phase one, proof that payment of benefits "significantly frustrated the federal policy of collective bargaining . . ." (475 F. 2d at 459). The First Circuit went on to state that phase two would probably never be "reached" (*Id.*). It added further that even if this phase were reached, the District Court could "properly decline to find preemption" if it felt that the state and federal interests were closely balanced, "because of the historical and continuing Congressional awareness, opportunity, and demonstrated willingness to act in this field." (475 F. 2d at 457).

Indeed, the Grinnell Corporation would hardly be engaging in a simultaneous effort to ask this Court to *review* the *Grinnell* decision* if the holding there had supported their point of view and contradicted that of the Second Circuit. As the former Solicitor General of the United States and the National Labor Relations Board noted (p. 10) in their brief in *Kimbell:***

> "A final factor militating against plenary review in this case is that there is no conflict of decisions requir-

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*(footnote continued from preceding page)*

emptive federal labor policy of government neutrality in labor disputes . . . [T]he statute, to the extent it subsidized strikers, [is] invalid under the Supremacy Clause of the United States Constitution."

* We are advised that Grinnell Corporation has sought leave to file a cross-petition for certiorari out of time in this Court requesting rehearing in *Grinnell* v. *Hackett.* Their request was filed on January 4, 1977, the same day that petitioners filed their request for certiorari in *Telco.* The national Chamber of Commerce, a movant herein, was listed in Grinnell's papers as supporting its application.

** See p. 9, *supra.*

ing resolution by this Court. *Grinnell, supra,* while calling for a weighing of federal and state interests, did not find that the state statute conflicted with the federal statute but merely remanded the case for further proceedings."

One other Circuit has ruled on the question at issue. The Third Circuit's decision in *Super Tire Engineering Co.* v. *McCorkle, supra,* on which this Court denied rehearing last month, rejected the argument that a state provision permitting the payment of welfare to strikers violated federal welfare law and concluded further—under the mandate of *Kimbell*—that federal labor policy does not preclude the payment of unemployment compensation to strikers. (550 F. 2d at 908, 906).*

Petitioners' claims of a District Court "conflict," like its argument that the Second Circuit's opinion is incompatible with those of other Circuits, does not withstand analysis. The District Court in *Hawaiian Telco, supra,* concluded after a plenary trial that Hawaii's statute irreconcilably intrudes into the federal process of free collective bargaining and must therefore be "stricken down" (405 F. Supp. at 290). However, it is the *Hawaiian Telco* decision itself which has been "stricken down" by this Court. As we have seen *supra,* the statute upheld in *Kimbell* was identical to the provision at issue in the Hawaii case.**

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* This resolution of the attacks on welfare payments to strikers has significant implications in the case at bar. It must be recognized at the outset that unemployment benefits, unlike welfare payments, are available in New York only in the small percentage of strikes that are greater than eight weeks. Moreover, the result of paying welfare benefits to needy persons is to provide economic assistance to the group of strikers who can least afford to be without a salary and who—under petitioners' rationale—would otherwise quickly return to work. Welfare assists strikers as to whom there has *already been a finding that they have no alternate resources available.* As such eligibility does not frustrate "the policy of free collective bargaining embedded in the federal labor laws" (Petition, p. 19), the statute at bar clearly could not contravene any congressional prohibition.

** Prior to the Second Circuit decision herein and that of the Third Circuit in *Super Tire,* a Michigan District Court considering

*(footnote continued on following page)*



Thus, petitioners' difficulty is not that the law is uncertain but that it is settled, not that no guidance has been provided but that petitioners prefer not to be guided.* This Court's holding that no substantial federal question was presented in *Kimbell* and its ruling in *Hodory* that Congress has always been capable of requiring or prohibiting conditions as to eligibility for benefits, have answered the labor preemption claims raised herein. Each Circuit Court which has reached a final determination as to these claims has rejected them.

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*(footnote continued from preceding page)*

preemption claims, in *Dow Chemical Co.* v. *Taylor,* 428 F. Supp. 86 (E.D. Mich. 1977), declined to proceed to trial but instead certified to the 6th Circuit the question of whether *Kimbell* foreclosed further proceedings in the case (No. 77-8064). The other District Court opinion cited by petitioners herein, *American Broadcasting Co.* v. *New York State Department of Labor,* 77 Civ. 2995 (S.D.N.Y. 1977), is not viable after the Second Circuit's definitive decision. *Cf. Powell* v. *United States,* 338 F. 2d 556 (7th Cir. 1964).

* See the decision of the District Court following *Super Tire* and *Telco,* dismissing with prejudice a request to enjoin payment of unemployment compensation to strikers in *Virgin Islands Telephone Corp.* v. *Upson,* Civ. No. 77-276 (D. Virgin Islands, November 11, 1977). Chief Judge Christian noted that "there is little likelihood that plaintiff would prevail upon a trial on the merits in view of the teaching of *Super Tire* . . . and further in view of the fact that [*Telco*], principally relied on by plaintiff, has been overturned . . ." See also *Olin Corp.* v. *State of Illinois, Dep't of Labor,* Civ. No. 77-5156 (S.D. Ill. January 9, 1978) (Ackerman, J.) dismissing a preemption challenge to Illinois' statute granting unemployment benefits to persons who refuse to cross picket lines. Ill. Rev. Stat. ch. 48, § 434 (1975). The court was guided by the Second Circuit's decision herein.

## CONCLUSION

**For the foregoing reasons, the petition for a writ of certiorari should be denied.**

Dated: New York, New York
February 17, 1978

Respectfully submitted,

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Supreme Court, U. S.
FILED
FEB 23 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-961**

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

v.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

*Respondents.*

## PETITIONERS' REPLY BRIEF

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LONG LINES DEPARTMENT

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## PETITIONERS' REPLY BRIEF

Although the Court of Appeals effectively accepted the District Court's clear-cut findings concerning the substantial impact on collective bargaining and strikes of unemployment compensation for strikers, Respondents still resist them, devoting a full segment of their brief in opposition to minimizing that impact as so found (R. 2-5).* Pursuing this same tack of discussing the merits of the decision below rather than its jurisprudential implications as they relate to certiorari review, Respondents discuss

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* Reference is to Brief for Respondents in Opposition.

the congressional history on which much of the disagreement in the courts below centers (R. 10-14).

In the interests of brevity and to avoid compounding the error of prematurely briefing the merits of this case, we shall not burden this reply by further discussion of the merits of either of these questions. Instead, we shall focus on the conflicts among the circuits presented by this case and the confusion thereby engendered, all of which call for review by this Court.

## (1)

Respondents attempt to downplay the substantial differences between the First and Second Circuits by characterizing the conflict as "fall[ing] far short of providing a basis for the granting of certiorari" (R. 14-15). But the Second Circuit was quite explicit in spelling out its disagreements with the First Circuit and with the federal district court in Hawaii. Thus, in this connection, it stated:

> In a preemption case such as this one, "the crucial inquiry [is] whether Congress intended [this field to] be unregulated because [it was] left 'to be controlled by the free play of economic forces.'" Accordingly, we must examine congressional intent. Those courts that have considered Congress' intent with respect to the payment of unemployment benefits to strikers have found it "ambiguous." *We do not agree.* [6a-7a; footnote and citations omitted; emphasis supplied].

Where the Second Circuit, as a matter of law, found the issue of congressional intent dispositive and ordered the dismissal of the complaint in this case, the First Circuit, in *Grinnell,* refused to uphold dismissal of the complaint



therein on that ground (although urged to) and remanded the case for a trial. This is not merely of academic significance as Respondents would have it believed (R. 5). Indeed, the conflict between those decisions is already taking its toll in confusion among and between courts. For example, as footnoted in Respondents' brief (p. 17), at least two federal district courts (Virgin Islands and Illinois) have dismissed preemption challenges to the payment of unemployment compensation to strikers relying in part on the Second Circuit's position as to the controlling force of the legislative history. Several other district courts, in refusing to grant motions to dismiss, have expressly rejected this view and, instead, have followed the First Circuit's contrary position. These include district courts in Michigan, Hawaii and New York in the cases cited and discussed at pages 12-14 of the petition herein. *See also* the district court's decision in *Westinghouse Broadcasting Co.* v. *Commonwealth of Massachusetts,* Civil Action No. 76-1409-S (D. Mass. Apr. 26, 1976).*

## (2)

Respondents' extensive references in their brief to this Court's summary dismissal of the appeal in *Kimbell* (R. 5, 6, 7, 8, 9, 15, 16, 17) serve but to provide additional reasons for granting the writ here sought. The application of

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* That the Second and First Circuits may have had some "shared doubts" on preemption, as contended by Respondents (R. 15), is belied not only by the conflict just discussed but also by the fact that whatever doubts were expressed by the First Circuit concerning an employer's ability to amass the necessary proof on impact, they were not shared by the Second Circuit which accepted the district court's conclusion in this case that the impact of unemployment compensation to strikers on the federal labor policy was substantial and proven.

*Kimbell* under this Court's *Hicks* doctrine has created a conflict among the circuits which, in turn, has served to compound the existing uncertainties, earlier discussed, with which lower courts already are faced in deciding cases involving challenges to state unemployment compensation laws which pay benefits to strikers. That conflict was described by the Second Circuit as follows (7a n.2):

> In *Kimbell, Inc.* v. *Employment Security Commission of New Mexico,* 429 U.S. 804 (1976), the Supreme Court dismissed, for want of a substantial question, an appeal which raised, *inter alia,* the question at issue here. *Kimbell, Inc.* v. *Employment Security Commission of New Mexico,* No. 10323 (N.M. Sup. Ct. Dec. 29, 1975), *rev'g, Albuquerque-Phoenix Express, Inc.* v. *Employment Security Commission of New Mexico,* 88 N.M. 596, 544 P.2d 1161 (1975). We must therefore decide whether, under the doctrine of *Hicks* v. *Miranda,* 422 U.S. 332 (1975), the *Kimbell* dismissal is controlling. *See generally* Comment, The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of *Hicks* v. *Miranda,* 76 Colum. L. Rev. 508 (1976). We agree with the district court that it is not. *See also Dow Chem. Co.* v. *Taylor,* 428 F. Supp. 86 (E.D. Mich. 1977). The district court's view has been confirmed by subsequent indications from the Supreme Court itself. *Ohio Bureau of Employment Servs.* v. *Hodory,* 45 U.S.L.W. 4544, 4545 n.3 (May 31, 1977); *Batterton* v. *Francis,* 45 U.S.L.W. 4768, 4770 n.7 (June 20, 1977). We are aware of the contrary decision of the Third Circuit in *Super Tire Eng'ring Co.* v. *McCorkle,* 550 F.2d 903 (3d Cir.), *cert. filed,* 46 U.S.L.W. 3110 (U.S. Aug. 30, 1977), and we respectfully disagree with that Court. We note that *Super Tire* was decided prior to *Hodory* and *Batterton.*



District courts in Hawaii, Michigan and New York similarly have ruled that this Court's dismissal in *Kimbell* was not dispositive of the challenges to state unemployment statutes before them. *Hawaii Employers Council* v. *State of Hawaii Dep't of Labor & Indus. Rel. (Pearl Harbor Fed. Credit Union),* Civil No. 74-262 (D. Hawaii July 5, 1977);* *Dow Chem. Co.* v. *Taylor,* 428 F. Supp. 86 (E.D. Mich. 1977), *certified to 6th Cir.* (E.D. Mich. May 19, 1977) (No. 77-8064); *American Broadcasting Cos.* v. *New York State Dep't of Labor,* 77 Civ. 2995 (S.D.N.Y. June 30, 1977). *See also Olin Corp.* v. *State of Illinois Dep't of Labor,* Civ. No. 77-5156 (S.D. Ill. Jan. 9, 1978) (*appeal filed* 7th Cir.). The Michigan ruling is now before the Sixth Circuit on a certified question. The Third Circuit's contrary view, however, was found controlling recently by a district court in the Virgin Islands. *Virgin Islands Telephone Corp.* v. *Upson,* Civ. No. 77-276 (D. Virgin Islands Nov. 11, 1977).

The summary dismissal in *Kimbell,* of course, is not binding on this Court. *Edelman* v. *Jordan,* 415 U.S. 651, 670-71 (1974). In light of the conflict among the circuits as to the scope and reach of the *Kimbell* ruling as applied in the lower courts and of the uncertainties it has produced in the district courts, it is appropriate that this Court grant the writ sought herein and settle the labor preemption question presented.

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* This was one of four cases consolidated for hearing in Hawaii.

That this question is of widespread importance cannot be doubted. More than fifteen cases presenting it are now pending before the federal courts.* And, as illustrated by the briefs *amici curiae* filed in support of the petition, large and varied segments of the business community spanning the entire country are urging review of the decision below.**

## CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
February 22, 1978

Respectfully submitted,

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** Although not before this Court, some 23 unions intervened in this case as *amici curiae* before the Second Circuit.



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Supreme Court, U. S.
FILED
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-961**

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

v.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

# Supreme Court of the United States

October Term, 1977

**No. 77-961**

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New York Telephone Company, Western Electric Company, American Telephone & Telegraph Company, Long Lines Department, and Empire City Subway Company (Limited),

*Petitioners,*

v.

New York State Department of Labor, Louis L. Levine, Industrial Commissioner of the New York State Department of Labor, New York State Department of Taxation & Finance, and James H. Tully, Jr., State Commissioner of Taxation & Finance,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## BRIEF FOR THE PETITIONERS

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### Opinions Below

The opinion of the Court of Appeals for the Second Circuit[1] is reported at 566 F.2d 388 (1977). It also appears

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[1] Meskill, Circuit Judge, Bryan and Stewart, District Judges of the Southern District of New York.

in the appendix to the Petition for Certiorari herein (Pet. 1a-18a) and is unofficially reported at 96 L.R.R.M. 2921. It reverses the decision of the United States District Court for the Southern District of New York (Owen, J.) (Pet. 23a-54a), reported at 434 F. Supp. 810 and 95 L.R.R.M. 2487, which held the payment of unemployment compensation to strikers under the New York Labor Law to be an unconstitutional infringement upon federal labor policy.

## Jurisdiction

A Petition for Certiorari was filed on January 4, 1978, within 90 days of the entry of the judgment of the Court of Appeals for the Second Circuit on November 9, 1977. Certiorari was granted by this Court on March 27, 1978. The Court's jurisdiction rests on 62 Stat. 928, 28 U.S.C. §1254(1).

## Constitutional Provision and Statutes Involved

Article VI, Clause 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

Section 592.1 of the New York Labor Law (McKinney 1977) provides for the payment of unemployment compensation to strikers after a "Suspension of accumulation of benefit rights":



> 1. Industrial controversy. The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning with the day after such strike, lockout, or other industrial controversy was terminated.

The pertinent federal labor policy is embodied in the National Labor Relations Act, *as amended* (hereinafter "NLRA"), 29 U.S.C. §§141 *et seq.*, and is described at pages 20-22, *infra*.

## Questions Presented

1. Whether Congress, in fashioning a comprehensive national labor policy mandating government neutrality in labor disputes and leaving the area of collective bargaining to the free play of economic forces, intended that the several states be permitted to grant unemployment compensation to strikers at the expense of the struck employer.

2. Whether the federal policy of government neutrality in collective bargaining must give way to state enactments granting employer-financed unemployment compensation to strikers, regardless of the adverse impact of such benefits on free collective bargaining.

## Statement of the Case

**A. *The Proceedings.***

The commencement of this suit on October 24, 1973,[2] followed a seven-month long strike against petitioners[3] by the New York locals of the Communications Workers of America, AFL-CIO ("CWA"), during which some $49,000,000 in unemployment insurance benefits were paid out to some 33,000 strikers (Pre-Trial Order ("PTO") ¶35 b, c, A. 59).[4] Since New York unemployment insurance benefits are financed entirely by employer contributions assessed on the basis of experience rating, the full cost of these payments was debited against and borne by the struck employers (Pet. 6a).

The complaint sought, along with other relief, a judgment declaring the New York statute providing unemployment compensation for strikers unconstitutional. Respondents moved for a summary judgment dismissing the complaint and the District Court (Owen, J.) denied the motion in all respects (Memorandum Opinion #42,125, filed March 31, 1975, appearing at Pet. 55a-56a).

The issue of liability was first and separately tried, with the understanding that the question of the amount of monetary damages would subsequently be heard if the statute in question were found to be unconstitutional. The trial

[2] The District Court had jurisdiction of this case under 28 U.S.C. §§1331, 1337 and 1343. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars in respect to each of the plaintiffs-petitioners.

[3] Hereafter sometimes collectively referred to as "the Bell Companies". Respondents are collectively referred to herein as "the State".

[4] Reference is to the Joint Appendix herein.



consumed nine days, during the course of which the District Court heard twelve witnesses and received approximately 450 exhibits. On May 23, 1977, the District Court issued its Opinion and Order declaring the New York statute unconstitutional to the extent it provides unemployment compensation to strikers (Pet. 23a-54a). It further found that recovery of damages would not be barred by the Eleventh Amendment (Pet. 53a-54a). Thereafter, on June 24, 1977, the District Court issued its Declaratory Judgment and Order for Permanent Injunction (Pet. 19a-22a), subsequently entered on June 27, 1977.

On November 9, 1977, after an expedited appeal, the Court of Appeals for the Second Circuit reversed the decision below and remanded with instructions to dismiss the complaint (Pet. 1a-18a).

**B. *The Facts.***

The facts in this case, as found by the District Court (Pet. 24a-28a), were implicitly accepted by the Court of Appeals (Pet. 5a-6a). In the words of the Court of Appeals, they proved a "conflict between New York's statute and the broad federal policy of free collective bargaining" (Pet. 17a). And, as stated by the District Court, "to the extent it [the New York statute] provides for the payment of unemployment compensation to strikers [it] is state intervention on behalf of the strikers, causes an employer to finance its own strikers, [and] is in conflict with federal labor policy" (Pet. 54a).

Notwithstanding this proven conflict, the Court of Appeals reversed the finding below of unconstitutionality on the ground that Congress, in effect, had granted the several states *carte blanche* to provide unemployment compensa-

tion to strikers regardless of the impact thereof on the federal labor policy of government neutrality in labor disputes and of free collective bargaining.

New York's Unemployment Insurance Law grants striking employees unemployment compensation after a combined suspension and waiting period of eight weeks. N.Y. Labor Law §§590.9, 592.1 (McKinney 1977).[5] No showing of need is required to entitle a striker to weekly benefits which, under present law, amount to a maximum of $115.00 and, as of September 1978, will be increased to $125.00.[6] All such benefits, as earlier stated, are financed by the struck employer.

The District Court

> regard[ed] it as a fundamental truism that the availability to, or expectation or receipt of a substantial weekly tax-free payment of money by, a striker is a substantial factor affecting his willingness to go on strike or, once on strike, to remain on strike, in the pursuit of desired goals. [Pet. 28a; footnotes omitted]

It, however, did not simply rely on this truism. In making its findings of fact, it found in the extensive record before it "confirmation of . . . [the truism] everywhere" (Pet. 28a).

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[5] Rhode Island has a similar law requiring a waiting period of seven weeks. R.I. Gen. Laws §28-44-16. Other states have different laws under which unemployment compensation is paid to strikers. There are at least 15 other lawsuits presently pending in the federal courts challenging laws of this kind on federal labor law preemption grounds. These cases are cited at page 15 of the Petition herein and at page 6 (first footnote) of Petitioners' Reply Brief.

[6] The maximum was $75.00 during the 1971-1972 strike involved in this case.



The record abounds with proof of the widespread and growing recognition throughout the labor community that this form of state-ordered (but employer-financed) cash subsidy to strikers exerts a compound influence on the bargaining positions and strategies of the parties to a labor dispute. It strengthens the strikers who receive it while simultaneously sapping the strength of the employer who pays it. This potent dual effect was found to exist by the District Judge on the basis of evidence emanating largely from unions themselves.

It would lengthen this brief beyond reasonable limits to attempt a summary of all that evidence or of all the findings based on that evidence. Accordingly, our discussion of the facts will be limited to some overall highlights of the record.

Suffice it to say here that when the trial record was closed, any notion that employer-financed unemployment insurance benefits guaranteed to strikers could co-exist with the policy of governmental neutrality in labor disputes was dispelled once and for all.

### 1. The 1971-1972 CWA Negotiations and Strike.

In June of 1971 the CWA, as national bargaining agent, recommended a nationwide strike against the Bell System which began on July 14. On July 18, the parties reached an agreement in principle and CWA ordered all its members back to work on July 21. Throughout the country all returned except some 38,000 in New York State who insisted on staying out.

A national membership ratification vote was set for August 14, 1971, and both CWA and its top official in

New York State strongly endorsed ratification. The balloting resulted in a resounding ratification of the contract in every CWA bargaining unit across the country with the single exception of the New York State unit for Telco and its wholly-owned subsidiary, Empire City Subway Company (Limited) ("Empire"). Despite nationwide ratification and the International CWA's directive to return to work, the strike was continued in New York where it was to last seven months. Its object was to break the ratified national pattern for New York-based employees of the Bell System.[7] Faced with the determination of its New York locals, CWA subsequently decided to support their illegal strike.[8]

During the first week of September 1971 the strikers became eligible for weekly unemployment compensation in a tax-free amount "adequate or almost adequate to meet essential needs" (Pet. 37a) and, as previously mentioned, benefit payments to the strikers amounted to some $49,000,000 before the strike ended.

The substantial impact of these payments to strikers on the CWA strike and on the collective bargaining of both the union and the struck employers is summarized in the opinion of the District Court (Pet. 26a-32a). Illustrative of this impact was the description at trial by Telco's chief negotiator of how Telco's position during the early months of the strike was premised in large part on the belief that the attempt by CWA's locals in New York to break the national pattern "could only lead to

[7] For a description of pattern bargaining in the Bell System, see Pet. 25a.

[8] The strike was ruled illegal by the National Labor Relations Board in *Communications Wkrs. of America (New York Tel. Co.)*, 208 N.L.R.B. 267 (1973). Pet. 28a.



labor turmoil throughout the Bell System" and, accordingly, should be firmly resisted (A. 313-15). After a number of months had passed, however,

> Telco saw that the strike would not end without some concession to union demands and, noting that employees were still eligible for six or more months of unemployment compensation, decided to settle along the lines recommended by the federal mediator. [Pet. 27a; *see* A. 308-17]

The importance of the expectation and receipt of unemployment compensation to CWA and its striking members was attested by CWA's own statements on the subject. Thus the union threatened Telco at the bargaining table that it would have the union "at your throats for the next 10 years" if the union's suspicions (later shown as unfounded) that Telco was delaying unemployment benefits were confirmed (P. Ex. 161, A. 125; Tr. 36).[9] And, shortly after the strike, the union's strike leader, a Vice President of the International, wrote to the New York CWA-represented employees:

> The fact that more than 80% of the membership stood together for 218 days is simply incredible. In my judgment, it is a testimonial to three phenomena:
>
> 1. Dedication and spirit of the strikers
> 2. Unemployment insurance
> 3. Effectiveness of CWA's defense fund
>
> [P. Ex. 159, A. 119; Tr. 27]

[9] Reference is to an exhibit of plaintiffs in the District Court below, where it appears in the Joint Appendix herein, and the place in the transcript of District Court proceedings where it was offered into evidence.

The extent and nature of the impact of unemployment compensation on collective bargaining and strikes generally cannot be fully appreciated without sampling the flavor of union statements such as the foregoing. The District Court's opinion culled but a few examples[10] from the hundreds placed in evidence. The substance and multitude of CWA's communications to its members bespoke, in most emphatic terms, the fundamental soundness of the findings in this case concerning the impact of unemployment insurance.

In an issue of the "New York Generator," a CWA newspaper, appearing shortly after this suit was filed, reference was made to the suit as an attempt to "sabotage our [union's] strike weapon" (P. Ex. 165, A. 130; Tr. 27).

In November 1971, during the strike, CWA's strike leader in New York wrote to the CWA local presidents that "New York State Unemployment Compensation is a tremendous assist to our members" (P. Ex. 152, A. 111; Tr. 27). The local unions agreed. Thus in April 1973, a recorded telephone message by CWA Local 1103 in Westchester, New York, to its members (but open to anyone wishing to listen) stated:

> If we did not get [unemployment insurance] aid during the big strike of '71 and '72, I don't know where we would be right now. [P. Ex. 36, A. 73; Tr. 19]

Starting before the strike began, CWA promoted maximum resort to unemployment compensation benefits by its members (P. Exs. 86, 128, A. 85, 93; Tr. 19).

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[10] Those emanating from the CWA strike against the Bell Companies are discussed at Pet. 29a-32a; those from other strikes by the CWA as well as other major unions appear at Pet. 32a-33a.



As the date on which eligibility for unemployment compensation approached, various CWA locals alerted their members through recorded telephone messages and personal telephone calls (P. Exs. 38, 79, 82, 93; A. 74, 82, 84, 86; Tr. 19).

Once the benefits became payable, numerous CWA messages reminded the strikers to make claims for unemployment compensation (*e.g.*, P. Ex. 104, A. 89; Tr. 19).

CWA employed the strikers' entitlement to unemployment compensation as a morale booster (P. Exs. 7, 56, 357, A. 77; Tr. 19, 31). It brought local unemployment insurance officials to speak at union meetings concerning sources of public assistance and, in particular, unemployment compensation (P. Ex. 342, A. 217; Tr. 35), used its own facilities as distribution centers for unemployment compensation information and applications (P. Ex. 97, A. 88; Tr. 19), and went to court and administrative agencies when errors were claimed in the administration of unemployment compensation or other public assistance for its members (P. Exs. 114, 122, 142, A. 91, 92, 94; Tr. 19).

Political and other pressures were brought to bear by CWA on public officials where grants of unemployment compensation were challenged, and one of its locals threatened to turn out of office a legislator proposing repeal of the law granting such benefits to strikers (P. Exs. 24, 25, A. 71; Tr. 19).

The union repeatedly expressed its full appreciation of the many purposes to which the unemployment compensation subsidy could be put, and the contrast between resort to that subsidy and resort to welfare, food stamps and the union's own strike fund lent added weight to the impact of the former.

The highest estimate of strikers receiving welfare heard by Telco's chief negotiator, Williams, was 1,000 (A. 309-10). CWA's strike leader in New York thought the actual number applying for welfare might be 1,000 but believed far fewer received such assistance (A. 323). Upwards of 33,000 strikers received unemployment compensation during the strike.

In order to conserve CWA's defense fund it was mandated that no food assistance was to be given out of that fund after September 7, 1971, when unemployment compensation was to start (P. Exs. 147, 144, A. 100, 97; Tr. 27).[11] In contrast to the $49 million paid by the State in employer-financed unemployment compensation, less than $14 million was disbursed by the union's own strike fund (P. Ex. 188; Tr. 27).[12]

**2. The Communications of Other Unions.**

It should not be supposed that the record was confined to expressions by the CWA concerning the importance and impact of unemployment compensation during the 1971-1972 strike against the Bell Companies. Numerous statements of kindred import were made in other strikes by

[11] The increasing resort by unions to government-granted benefits, including unemployment compensation to striking employees, in lieu of the unions' own strike funds, was recognized by the then Director of the Federal Mediation and Conciliation Service, J. Curtis Counts, when he stated:

> I believe that it is valid to conclude that these measures changed appreciably the economic pressures attached to the strike. Certainly, the nature of strike benefits was changed from one of union-employee responsibility to one of government assisted responsibility. [P. Ex. 366, A. 228; Tr. 237]

*See also,* P. Exs. 236, 242, 246, 261, A. 149, 162, 165; Tr. 50, 40, 51.

[12] A sampling of CWA communications has been reproduced at A. 68-130, 133-36, 178-86, 208-11, 226-27, 230.



other major unions such as the United Steelworkers of America (P. Exs. 234-A, 236, 259, 325, A. 147, 149, 203; Tr. 40, 50), the International Brotherhood of Electrical Workers (P. Exs. 251, 252, 322, 337, 339, A. 166, 168, 201, 212, 214; Tr. 31, 40), the Oil, Chemical and Atomic Workers International Union (P. Ex. 323; Tr. 40), and the United Automobile Workers (P. Ex. 353, A. 223; Tr. 40).

One of several examples cited in the District Court's opinion (Pet. 32a-33a) involved a nationwide strike by the International Union of Electrical Workers against the General Electric Company in 1969-1970. In a union meeting in Cleveland, Ohio, at the taking of a vote to end the strike, the union official chairing the meeting stated as follows:

> All I know is that Schenectady [New York] voted today 5 to 3 to stay out and you know the reason why. . . .
>
> Because they're getting $65 a week in unemployment compensation. [P. Ex. 172, A. 131; Tr. 40, a transcription of P. Ex. 169][13]

**3. The Experts.**

The District Court found further support for its conclusions on impact in the testimony of experts called by the Bell Companies (pursuant to the suggestion made in the opinion in *Grinnell Corp.* v. *Hackett,* 475 F.2d 449, 459 (1st Cir.), *cert. denied,* 414 U.S. 858, 879 (1973)), and in statistical and empirical studies offered by them (Pet. 33a-38a). These experts are all leaders of their professions and were authoritative, believed and deserved to be believed. Their eminent and impressive qualifications were

[13] In connection with the same strike, *see also,* P. Ex. 241, A. 161; Tr. 50, quoted in full by the District Court at Pet. 33a.

set forth at length during the trial (Tr. 398-406 [Glasser]; Tr. 1234-37 [Perl]; Tr. 240-43 [Backman].

The trial judge's findings concerning Dr. Jules Backman were:

> Dr. Jules Backman, an acknowledged expert in the field of collective bargaining, [was called by plaintiffs] to give an overview. Backman . . . saw the availability and payment of unemployment insurance benefits as affecting the duration of strikes in opposite directions. Under some circumstances, he felt, the awareness that the staying power of the union would be increased, while at the same time anticipating a rise in their unemployment insurance tax, would induce some employers to settle earlier, out of concern for what may happen after the eight week suspension period. Thus, he concluded, unemployment insurance could increase somewhat the incidence of earlier settlements. However, as the strike passed the eighth week, he saw the position becoming "dramatically one-sided," for (1) the employee comes into receipt of funds adequate or almost adequate to meet essential needs, thereby increasing staying power, (2) the union's willingness to make concessions is reduced because one of its duties, providing resources to meet the needs of strikers, has been met and will continue to be met for as much as a year, and (3) the employer, on the other hand, sees his striking employee being subsidized while he, the employer, is in effect financing the subsidy out of his unemployment insurance taxes. [Pet. 37a][14]

According to Dr. Backman, unemployment compensation provides an important, tax-free resource to strikers, approximately equal to the irreducible expenses of the average worker for food, shelter, and other necessities

[14] *See* A. 328-35, 340-41. This analysis was corroborated by testimony of Dr. Lewis J. Perl (Pet. 34a-36a), as well as by the State's witnesses Kuhn (A. 453-54, 466), and Haire (A. 375-86).



(A. 329-34). In his opinion, when a strike approaches the eighth week in New York, "the ability of strikers to hold out is significantly increased" and the ability of their union to stand firm on its bargaining demands "is changed very dramatically when these funds [unemployment compensation] become available" (A. 333-34).

The District Court saw in the testimony of Dr. Lewis J. Perl additional support for its findings. Dr. Perl had conducted a statistical comparison using the United States Bureau of Labor Statistics figures for the ten year period from 1965 through 1974 to test the hypothesis that the payment of unemployment compensation to strikers influences collective bargaining by increasing the *number* of strikes settled within eight weeks and the *duration* of strikes that continued beyond that period (Pet. 34a-35a). As the trial judge noted (Pet. 36a), "Perl's hypothesis was indeed supported."

> Perl's analysis of the Department of Labor statistics reveals that strikes of more than eight weeks last two to four weeks longer in New York State than in states other than New York and Rhode Island, while a greater percentage of strikes are settled in eight weeks or less in New York than in states other than New York and Rhode Island. Applying the settlement rate for the rest of the country to New York State, Perl concluded that 933,000 fewer man-days would be lost in New York each year were the national settlement rate to prevail here, which would constitute a 15% reduction in man-days lost due to strikes in New York. [Footnote omitted]

Dr. Gerald J. Glasser presented the results of an attitudinal survey which the District Court termed "professionally done . . . [and] indeed helpful" (Pet. 34a). The attitudes of groups of employees are significant, Dr.

Glasser testified, because they influence both labor leaders and management (Pet. 34a). As the District Court observed (Pet. 34a):

> The results [of Dr. Glasser's survey] showed a predominant feeling among both union and non-union workers that because of unemployment insurance in New York State unions can achieve better strike settlements, since unemployment insurance enables strikers to hold out longer. Less predominant, but still shared by one-half of the union and non-union workers who expressed an opinion, was the strong belief that unemployment insurance forced management to settle more quickly. A majority of the union members surveyed ranked *unemployment compensation* as the *first* resource they would turn to in a strike, *above welfare, food stamps and their union's own strike funds.* [Emphasis supplied; *see* P. Exs. 376-86, A. 235-45; Tr. 422]

The State unsuccessfully attempted to dispute the impressive body of expert opinion and professionally conducted statistical and attitudinal studies by calling several expert witnesses of its own. The District Court, after hearing and examining the State's experts, evaluated them as follows (Pet. 37a-38a):

> Often, in the course of their testimony . . . they ended up supporting plaintiffs' position. To the extent their testimony was in real or apparent conflict, *I reject it.* [Emphasis supplied; footnote omitted]

Indeed, the State itself has recognized and quantified some aspects of the impact of unemployment insurance to strikers in New York in its publication, "The Industrial Controversy Provision of the New York State Unemployment Insurance Law 1935-1973" (P. Ex. 345, A. 218; Tr. 72):



> About 9.3 percent of all work stoppages during the 26 years from 1947 to 1972 lasted longer than eight weeks. These stoppages involved 13.8 percent of all workers unemployed because of a strike in their establishment and 51.0 percent of mandays made idle. A total of 1,240 stoppages involving approximately 724,612 workers and 43,524,000 mandays idle fall into this category.

**4. The State's Reasons for Providing Unemployment Compensation to Strikers.**

New York State, as found by the District Court, possesses no cognizable interest which it can convincingly urge as condoning its intrusion into a federally guarded area (Pet. 38a).

Two witnesses called by the State at the trial bore this out (Pet. 38a-42a). The legislative draftsman (Dr. Herman Gray), whom the State produced as a co-author of New York's original Unemployment Insurance Law, testified in effect that the provision granting benefits to strikers was really a compromise reached primarily for administrative convenience (Pet. 39a; A. 363-65), *i.e.*, to avoid the necessity for the administering agency to determine who were strikers and who were simply refusing to cross a picket line out of fear or as a matter of principle. The compromise was that *all* who lost employment due to a labor dispute at their establishment (whether engaged in the strike or not) would be disqualified for a fixed waiting period, and then after serving the waiting period *all* would receive benefits. As found by the District Court, the avowed purpose of the law (*i.e.*, to benefit those who are *involuntarily* unemployed) thereby was "subverted for the purpose of mere administrative convenience" (Pet. 39a). Dr. Gray regretted this result later when, as Chairman of the New York State Unemployment Insurance Advisory Council,

he saw the extent and impact of the payments made to strikers. He therefore recommended in 1946 that benefits no longer be paid to strikers, since their payment runs "counter to the objective of the law" which is designed to benefit "persons unemployed through no fault of their own" (Pet. 39a-40a).

The State's second witness on this subject (Harold Kasper, Director of New York State's Unemployment Insurance Division) (Pet. 40a-42a) corroborated the conclusion that the claim of "administrative *inability*" to make distinctions between strikers and non-strikers, offered as justification for New York's law, amounted to no more than a desire to serve "administrative *convenience*" (emphasis court's; Pet. 41a). Moreover, recognizing an obligation on the State's part to maintain neutrality during labor disputes, Kasper claimed that this statute achieved that purpose by virtue of the waiting period. He himself, however, recognized that this was but a temporary neutrality predestined to end at a fixed time, which is in sight from the day the strike starts (A. 404). For, as found by the District Court, Kasper conceded that after eight weeks the "State intervenes to aid strikers through benefit payments chargeable against their struck employer" (Pet. 41a; footnote omitted).

## Summary of Argument

In the National Labor Relations Act, Congress has structured a system of collective bargaining, free from government interference and intervention, which leaves "the results of the contest to the bargaining strengths of the parties." *H.K. Porter Co.* v. *NLRB,* 397 U.S. 99, 108 (1970).



The use of economic force is "part and parcel of the process" and the "economic weakness of . . . [either] party cannot justify state aid." *Lodge 76, IAM* v. *Wisconsin Employment Rel. Comm'n,* 427 U.S. 132, 149 (1976). Collective bargaining as so envisioned under the NLRA "does not entail any 'right' to insist on one's position free from economic disadvantage." *American Ship Bldg. Co.* v. *NLRB,* 380 U.S. 300, 309 (1965).

Congress' policy mandating government neutrality in the collective bargaining area is fundamental to the federal scheme. This Court has been vigilant in protecting against state incursions into areas, such as this, intended by Congress to be left for "'the free play of economic forces.'" *Lodge 76, IAM,* 427 U.S. at 140. State laws which have a tendency to frustrate the policy of neutrality, or which create a substantial risk of conflict therewith, are consistently invalidated under the labor preemption doctrine.

The existence of open, direct and substantial conflict between the federal policy of neutrality and New York State's statute compelling payment of employer-financed unemployment compensation to striking employees was definitively and compellingly proved and found below. The view that congressional history (consisting largely of what Congress did *not* do and did *not* say) somehow requires an inference of congressional tolerance of this proven conflict is untenable.

The New York law, under well-established preemption principles, must be invalidated insofar as it mandates employer-financed payments of unemployment compensation benefits to strikers.

## ARGUMENT

### I

### New York State's Statute Granting Employer-Financed Unemployment Compensation to Strikers Is in Direct and Substantial Conflict With National Labor Policy. It Was Correctly Held Unconstitutional by the District Court on a Record Which Demonstrated and Documented That Conflict.

#### A. *National Labor Policy Is Preemptive and Supreme. Collective Bargaining Free From Government Interference Is Central to the Uniform Federal Scheme.*

Congress has regulated and occupied the area of labor relations "to the full extent of its constitutional power under the Commerce Clause," *Street, Elec. Ry. & Motor Coach Employees* v. *Wisconsin Employment Rel. Bd.*, 340 U.S. 383, 391 (1951), and, accordingly, no state may enter into this area by legislation or other means which have a "tendency to frustrate" the operation of the federal labor scheme, *Nash* v. *Florida Indus. Comm'n*, 389 U.S. 235, 239 (1967), *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468 (1955), or which "creates a substantial risk of conflict with policies central to the federal labor law," *Connell Constr. Co.* v. *Plumbers Local 100*, 421 U.S. 616, 636 (1975).

This Court has repeatedly recognized that the national policy promoting collective bargaining free from government interference is of just such central significance. *See, e.g., H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970); *Street, Elec. Ry. & Motor Coach Employees, Div. 1287* v. *Missouri*, 374 U.S. 74, 82 (1963); *NLRB* v. *American*



*Nat'l Ins. Co.*, 343 U.S. 395, 401-03 (1952); *Teamsters Local 24* v. *Oliver*, 358 U.S. 283, 295 (1959). Thus, any state law which "stands as an obstacle to the accomplishment of the full purpose and objectives of Congress" in creating this policy, as does the New York law at issue in this case, must be declared invalid and nullified under the Supremacy Clause[15] of the United States Constitution. *Hill* v. *Florida*, 325 U.S. 538, 542 (1945).

Free collective bargaining, as insured by the federal labor policy, is premised on the concept of government noninterference and neutrality. While the government "acts to oversee and referee the process of collective bargaining," it leaves "the results of the contest to the bargaining strengths of the parties." *H.K. Porter*, 397 U.S. at 108. Indeed, the right to bargain collectively clearly contemplates economic warfare and "does not entail any 'right' to insist on one's position free from economic disadvantage." *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 309 (1965). As a practical matter, it is the use of economic force or its availability in reserve that acts as the prime motive or catalyst under the federal scheme for reaching agreements in collective bargaining. *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960); *Lodge 76, IAM* v. *Wisconsin Employment Rel. Comm'n*, 427 U.S. 132, 149 (1976). Each of the negotiating parties is left to his respective resources, with each party expected to absorb the natural consequences of his own economic actions. *American Ship Bldg.*, 380 U.S. at 309, 313. The "economic weakness of . . . [either] party cannot justify state aid." *Lodge 76, IAM*, 427 U.S. at 149.

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[15] Quoted at p. 2, *supra*.

Congress' policy mandating government neutrality in collective bargaining and labor disputes has been uniformly and consistently applied against all government interference unauthorized by Congress without regard to its source. Not even the National Labor Relations Board, created by Congress to implement its labor policy, may depart from this policy. *H.K. Porter,* 397 U.S. 99. It falls within one of the most zealously guarded areas of federal supremacy.

**B. *New York's Grant of Employer-Financed Unemployment Compensation to Strikers Frustrates the Accomplishment of the Purposes of the National Labor Policy Guaranteeing Free Collective Bargaining.***

The congressionally prescribed governmental abstention from altering the economic balance of power between parties to collective bargaining requires that state legislation which operates to alter the relative bargaining strengths of the parties, either by financial subsidy or otherwise, be federally preempted. States are forbidden, this Court stated, to "upset the balance of power between labor and management expressed in our national labor policy." *Teamsters Local 20* v. *Morton,* 377 U.S. 252, 259-60 (1964); *Lodge 76, IAM,* 427 U.S. at 146-47.

The District Court in this case correctly applied these well-established principles of labor law preemption in finding that the New York Unemployment Insurance Law, insofar as it grants unemployment compensation to strikers, (a) constitutes state intervention on their behalf, (b) tips the economic scales in their favor and (c) forces New York employers to subsidize lengthy strikes against themselves, all in conflict with the preemptive national labor policy of governmental neutrality in labor disputes and collective



bargaining. (Pet. 54a, 45a, 28a). It accordingly declared the statute, to the extent it subsidizes strikers, invalid under the Supremacy Clause (Pet. 20a, 54a).[16]

The Court of Appeals implicitly accepted the District Court's findings on this subject and expressly recognized the head-on conflict with the federal scheme. It nevertheless concluded that the national labor policy must give way since

> the conflict between New York's statute and the broad federal policy of free collective bargaining . . . is one which Congress has decided to tolerate. [Pet. 17a]

If permitted to stand, this decision would sanction the continuation of a proven and substantial state interference with federal labor policy. It opens the way to fifty separate and disparate state determinations concerning the extent and amount of state-granted, but employer-financed, subsidies to strikers, regardless of their adverse impact on free collective bargaining and on the balance struck by Congress in the federal labor laws.

In *Lodge 76, IAM,* this Court recognized that "Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining and labor disputes." 427 U.S. at 140 n. 4, quoting Cox, *Labor Law Preemption Revisited,* 85 Harv.L.Rev. 1337, 1352 (1972). That decision reaffirmed this Court's intent to

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[16] A similar decision was reached concerning Hawaii's law granting unemployment compensation to strikers in *Hawaiian Tel. Co.* v. *Hawaii Dep't of Labor & Indus. Rel.,* 405 F. Supp. 275 (D. Hawaii 1975), *appeals docketed* (9th Cir. Mar. 19 and May 22, 1976) (Nos. 76-1584, 76-2056), *cert. prior to circuit court decision denied,* 46 U.S.L.W. 3599 (U.S. Mar. 27, 1978) (No. 77-962).

guard the national labor policy against any state attempt to make dominant its own standards of properly balanced bargaining power or to enforce its own notions concerning the accommodation of the special interests of strikers, their unions and employers, and the public in collective bargaining and labor disputes. *Lodge 76, IAM,* 427 U.S. at 149-51. Expressly prohibited by this Court under its rationale in *Lodge 76, IAM* is any state intrusion into areas intended by Congress to be unregulated because left for " 'the free play of economic forces.' *NLRB* v. *Nash-Finch Co.,* 404 U.S. 138, 144 (1971)." *Id.* at 140.[17]

New York's law cannot survive scrutiny under these governing preemption principles. The direct financial subsidy[18] granted under that law provides the union with a strike weapon and its striking membership with the financial means to resist settlement and a return to work before their demands are met at the bargaining table. These substantial weekly tax-free payments to a striker, the District Court found, are a "substantial factor affecting his will-

[17] This analysis was earlier applied by this Court in *Morton,* 377 U.S. 252. It should be distinguished from the *Garmon* line of preemption analysis which has its genesis in *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236 (1959), and was most recently applied in *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters,* 46 U.S.L.W. 4446 (U.S. May 15, 1978) (No. 76-750) and *Farmer* v. *Carpenters Local 25,* 430 U.S. 290 (1977). The *Garmon* analysis focuses on the primary jurisdiction of the National Labor Relations Board under the NLRA—not on the matter of governmental aid to one party to an economic dispute at the expense of the other.

[18] The maximum amount, as earlier stated, is $115 tax free, to be increased in September 1978 to $125. The maximum at the time of the Telco strike was $75 and this, as found below on the basis of expert testimony, was sufficient to meet the essential needs of the strikers during the 1971-1972 strike in this case, thereby increasing their staying power.



ingness to go on strike or, once on strike, to remain on strike" (Pet. 28a).[19]

The employer, on the other hand, not only sees his striking employees being subsidized, but is aware that he, the employer, is financing the subsidy out of his unemployment insurance taxes (Pet. 37a). Management negotiators—like their union counterparts—are clearly impressed by the fact that, under the unemployment insurance taxing scheme, the payment of benefits to strikers will deplete the employer's experience-rating account in the Unemployment Insurance Fund with the inevitable result of higher un-

[19] The District Court made mention in a footnote appearing at this point in its opinion that, "even as to welfare payments, for which one must make a showing of 'need,' " Justice Blackmun, in *Super Tire Eng'r Co.* v. *McCorkle,* 416 U.S. 115, 124 (1974), stated:

> It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract.

Welfare payments, of course, stand on a different footing from unemployment compensation, with the former available only to strikers who make the required showing of need and the latter available in New York to all strikers as of right without regard to need. Unemployment compensation therefore exerts a greater financial impact on strikes. For example, in the Telco strike 49 million dollars were funnelled into the pockets of 33,000 strikers through unemployment compensation while not more than 1,000 strikers received welfare benefits. In addition, since welfare is financed by the public treasury, its impact on collective bargaining and strikes is far more indirect and remote than unemployment compensation which *is financed from the pockets of the struck employer.* For a discussion of the differing state interests in the payment of these benefits and of the reasons why cases dealing with welfare payments to strikers are not controlling in the unemployment compensation area, *see Grinnell,* 475 F.2d at 459-60; *ITT Lamp Div.* v. *Minter,* 435 F.2d 989, 994-95 (1st Cir. 1970), *cert. denied,* 402 U.S. 933 (1971); and the District Court's opinion herein (Pet. 46a-47a).

employment insurance tax rates in the future.[20] This circumstance may cause management to accede to union demands prior to the end of the strikers' eight-week waiting period or, where strikers are actually collecting benefits, it may act as a continuing financial pressure point on the employer who knows that his experience-rating account is being depleted.

This state intrusion into an area Congress left to the "free play of economic forces",[21] is, as previously mentioned, expressly forbidden under this Court's rationale in *Lodge 76, IAM.* It "frustrates" the national labor policy mandating that "the balance of bargaining advantage . . . be set by economic power realities,"[22] and thereby runs afoul of the preemption principles applied by this Court in cases such as *Nash,* 389 U.S. 235; *Hill,* 325 U.S. 538; and *Connell,* 421 U.S. 616. The notion that Congress intended to "tolerate" optional state-by-state frustration of its labor policy is, we submit, untenable. In our later discussion

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[20] The amount of benefits paid out of the employer's account along with the contributions paid in by him in any single year determines his individual tax rate for the following year. As a result of the 49 million dollars paid to strikers in 1971 and 1972, Telco's tax rate went from one of the lowest possible rates before the strike to the highest, resulting in additional unemployment tax payments of approximately $6.5 million in 1972 and $9.3 million in 1973 in excess of those that would have been due and payable had no benefits been paid to strikers. PTO ¶35f, A. 60. Telco has estimated that it has made excess payments exceeding $37 million through 1977 and they continue. In short, the experience rating provisions of the New York law act as a conduit to move funds from the struck employer to the strikers. It should be noted that the NLRB has ruled that an employer may not be required "to subsidize the strike" against himself. *See, e.g., Southwestern Elec. Power Co.,* 216 N.L.R.B. 522 (1975).

[21] 427 U.S. at 140, quoting *Nash-Finch,* 404 U.S. at 144.

[22] *NLRB* v. *Burns Security Servs., Inc.,* 406 U.S. 272, 288 (1972).



(Point II, *infra*) of the patchwork of legislative history which has been summoned up to support this notion, we shall show that it provides no legal shelter for New York's offending statute.

### C. *Other Unemployment Compensation Cases: Hawaiian Telco and Nash.*

The preemption issue posed in this case was the subject of a decision reached after a plenary trial in another federal case involving the payment of unemployment compensation to strikers. *Hawaiian Tel. Co.* v. *Hawaii Dep't of Labor & Indus. Rel.,* 405 F. Supp. 275 (D. Hawaii 1975), *appeals docketed* (9th Cir. Mar. 19 and May 22, 1976) (Nos. 76-1584, 76-2056), *cert. prior to circuit court decision denied,* 46 U.S.L.W. 3599 (U.S. Mar. 27, 1978) (No. 77-962). Under Hawaii's law, strikers were entitled to unemployment benefits where their employer was able to continue operating his business in substantial part (about 80%) during a strike. The district court there, after finding that the Hawaiian law exerted a substantial impact on collective bargaining and strikes (405 F. Supp. at 282), concluded that the law (1) does not implement any "necessary 'state purposes,'" (2) "irreconcilably intrudes into the federal process of free collective bargaining," and (3) frustrates Congress' scheme that that process be free from state interference. *Id. at* 290.

Moreover, *Hawaiian Telco* is not the first case in which state eligibility requirements for unemployment compensation have been struck down because they were preempted by the federal labor policy. In *Nash* v. *Florida Indus. Comm'n,* 389 U.S. 235 (1967), this Court found a violation of the Supremacy Clause in the labor dispute provision of

the Florida Unemployment Compensation Law insofar as it denied benefits to a claimant because she filed an unfair labor practice charge with the NLRB. The Court concluded that Florida's eligibility requirements in this regard "frustrated" the purposes of the national labor legislation and stood as an "obstacle" to their full accomplishment.

As the National Labor Relations Board stated to this Court as an *amicus curiae* in *Nash* (Brief p. 7):

> Within broad limits [a state] is unquestionably free to prescribe the conditions upon which employees are entitled to receive the benefits of the State's unemployment compensation system. Nevertheless, a "state may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" • • • Thus, this Court has frequently set aside State regulatory schemes found to impair rights created by the National Labor Relations Act. See *Hill* v. *Florida,* 325 U.S. 538; *Auto Workers* v. *O'Brien,* 339 U.S. 454; *cf. San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236. And the conditions that a State may impose upon a grant of benefits are likewise subject to scrutiny to insure consistency with federal policy. It is quite clear a State cannot condition the grant of benefits in a manner that undermines rights protected by the Constitution or frustrates federal legislation.

The *Hawaiian Telco* decision and the principle laid down in this Court's decision in *Nash,* stand foursquare against the single underlying premise of the Court of Appeals' opinion below, namely, that each state enjoys the right to establish such eligibility requirements for unemployment compensation to strikers as it may wish, without regard to



the federal labor policy. This Court's observation in *Nash,* we submit, is applicable here:

> A national system for the implementation of this country's labor policy is not so dependent on state law. 389 U.S. at 239.[23]

**D. *None of the Court-Recognized Exceptions to the Preemption Doctrine Is Applicable Here.***

The New York statute does not fit into any of the exceptions to the preemption doctrine which have been permitted in labor cases. These exceptions have been limited by this Court essentially to cases where (1) the activity regulated by the state was "a merely peripheral concern" of the federal labor laws, *Garmon,* 359 U.S. at 243-44; *Lodge 76, IAM,* 427 U.S. at 136-37, (2) it "touched interests so deeply rooted in local feeling and responsibility that . . . [a court] could not infer that Congress had deprived the States of the power to act," *id.,* or (3) Congress has "affirmatively indicated" that the states have the power to act, *Street, Elec. Ry. & Motor Coach Employees* v. *Lockridge,* 403 U.S.

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[23] As previously noted, there are few areas of federal law, if any, which have been vouchsafed the degree of judicial protection from state interference as labor-management relations. With but few exceptions, both federal and state courts have uniformly declared preempted and invalidated state action wherever it could be shown that it had a significant effect, whether direct or indirect, upon the parties in collective bargaining or in a labor dispute. *See e.g., Lodge 76, IAM,* 427 U.S. 132; *Weber,* 348 U.S. 468; *Teamsters Local 24* v. *Oliver,* 358 U.S. 283 (1959); *UAW* v. *O'Brien,* 339 U.S. 454 (1950); *General Elec. Co.* v. *Callahan,* 294 F.2d 60 (1st Cir. 1961), *cert. dismissed,* 369 U.S. 832 (1962); *Oil, Chem. & Atomic Workers* v. *Arkansas Louisiana Gas Co.,* 332 F.2d 64 (10th Cir. 1964); *Grand Rapids City Coach Lines* v. *Howlett,* 137 F. Supp. 667 (W.D. Mich. 1955); *Delaware Coach Co.* v. *Public Serv. Comm'n,* 265 F. Supp. 648 (D. Del. 1967); *Rochester Tel. Corp.* v. *Levine,* 90 L.R.R.M. 3032 (W.D.N.Y. 1975); *John Hancock Mut. Life Ins. Co.* v. *Commissioner of Ins.,* 349 Mass. 390, 208 N.E.2d 516, 524-25 (1965).

274, 297 (1971); *Malone* v. *White Motor Co.*, 46 U.S.L.W. 4295 (U.S. Apr. 3, 1978) (No. 76-1184).[24]

None of these exceptions has been invoked in this case, save the last, and, with respect to it, the Court of Appeals' decision below, as shall be discussed more fully in Point II of this brief, is manifestly in error. The impact of the New York law on free collective bargaining is not peripheral in nature, stemming incidentally from a non-labor law of general application. It is, on the contrary, both direct and substantial, stemming from a provision of state law expressly dealing with benefits for strikers in labor disputes, which confronts the federal policy with New York's own and conflicting concept of supposed government "neutrality."

Nor can it be said that New York has an overriding or compelling state interest which, in itself, requires the obstruction of federal policy here found to be tolerated. No such interest was found under the Hawaiian law by the district court in *Hawaiian Telco,* 405 F. Supp. at 290, 289 n.71. And none was found nor exists here (Pet. 42a, 47a). As earlier stated, New York's law was the product of compromise reached for the purpose of mere administrative convenience (pp. 17-18, *supra*). Indeed the District Court noted that the avowed purpose of the New York Unemploy-

[24] Two other exceptions to the preemption doctrine, neither of which applies here, have been applied in *Garmon*-type primary jurisdiction cases. These relate to cases " 'where the particular rule of law sought to be invoked before another tribunal is so structured and administered that in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes,' " *Sears,* 46 U.S.L.W. at 4449 n.13, quoting from *Farmer,* 430 U.S. at 296-97, and where the "state court can ascertain the actual legal significance of particular conduct under federal law by reference to 'compelling precedent applied to essentially undisputed facts,' " *Sears,* 46 U.S.L.W. at 4449 n.13, quoting from *Garmon,* 359 U.S. at 246.



ment Insurance Law (as stated in § 501 of the New York Labor Law) "was subverted" to achieve that purpose (Pet. 39a). Thus, in 1946, the Chairman of the New York State Unemployment Insurance Advisory Council, who was one of the drafters of the New York law,[25] recommended that benefits no longer be paid to strikers because:

> The present provision of the law which permits the workers who voluntarily become unemployed because of a strike to receive benefits during the pendency of the strike runs counter to the objective of the law which "compels our setting aside of financial reserves for the benefit of persons unemployed through no fault of their own." [Pet. 39a-40a; *see* A. 368-71]

Not only is there no state interest existing in this case which merits balancing against the federal interest, but, as the District Court found, no such balancing is called for at all. Pet. 47a n.21; *accord, Hawaiian Telco,* 405 F. Supp. at 284 n.56. For once such a direct and substantial interference with a policy as central to the federal labor laws as the one here involved is found, no state interest, however compelling, can legitimize that interference. To hold otherwise, in the words of this Court, would be an "aberrational doctrine." *Perez* v. *Campbell,* 402 U.S. 637, 651 (1971). Neither the fact that a state has acted "through laws of broad general application rather than laws specifically directed towards the governance of industrial relations," *Garmon,* 359 U.S. at 244, nor the "relative importance to the State of its own law is . . . material," *Free* v. *Bland,* 369 U.S. 663, 666 (1962).[26]

[25] As earlier noted, Dr. Gray was called as a witness by the State in this case.

[26] For example, state "emergency legislation" enacted "to protect the public from threatened breakdowns in vital community services," was declared preempted by this Court in *Street, Elec. Ry. & Motor*

The District Court disposed of this subject in its conclusion that "even if such a [balancing] test were required, I would hold the federal interest superior to the state interest herein, which is at best one of administrative convenience" (Pet. 47a n.21).[27]

We proceed to a discussion of the congressional history and of the error committed by the Court of Appeals below in sweeping aside the conflict proved in this case and validating New York's out-and-out invasion of a federally forbidden province.

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*Coach Employees* v. *Missouri*, 373 U.S. at 80-81. It might be noted that in a recent *Garmon*-type case, where the risk of conflict between state and federal law was not as obvious, substantial or certain as in the case at bar, the Court did apply some balancing of state and federal interests. *Sears*, 46 U.S.L.W. 4446.

[27] The State's alternate explanation for its law (maintaining neutrality for eight weeks and, thereafter, intervening to pay benefits in aid of the strikers so they may meet their essential expenses) is, we submit, not only inferior to the federal interest but in direct and substantial conflict with it.



## II

**Congress Never Authorized Obstruction of Its National Labor Policy Through State Unemployment Compensation Laws Subsidizing Strikers. The Court of Appeals Erred in Inferring Congressional Tolerance of the Proven Conflict Between Such State Laws and the National Policy of Government Neutrality in Collective Bargaining.**

The Court of Appeals acknowledged the absence of any "positive expression of congressional intent" [28] on the subject of unemployment compensation for strikers and thereupon proceeded to infer one. The intent it so imputed to Congress was drawn from a patchwork of events, many unconnected, none clear-cut or bearing authentication by Congress as a body and some pointing in opposite directions from each other.

The Court of Appeals' finding of congressional tolerance for state grants of employer-financed unemployment benefits to strikers was founded on the twin beliefs that Congress wished to leave this subject "in the hands of local officials" and that the "national interest can be served as well by individual State experimentation as by enforced national uniformity" (Pet. 15a).

This conclusion was in direct conflict with the well-established federal rule of governmental neutrality in labor disputes and turned upside down the long-standing presumption in favor of federal preemption of state laws which presume to accommodate the special interests of the

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[28] Pet. 7a.

parties to such disputes. The Court of Appeals based this extraordinary grant of superseding state power on the fallacy that, because Congress did not *in haec verba* deny the power, it could be inferred from a combination of silence and inaction.

But the powerful labor preemption doctrine cannot so easily be swept aside. Certainly more than congressional silence is necessary to condone state intrusion, at will, into an area this Court has found central to the national labor policy. *Lodge 76, IAM,* 427 U.S. at 149-51.

The presumption in favor of federal preemption, ignored by the court below, has been explained by Professor Cox in these words:

> Where the state law or rule of decision is based upon an accommodation of the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining or labor disputes . . . the likelihood that its application . . . will upset the balance struck by Congress is so great as *to require exclusion of state law unless Congress has provided otherwise.* [Cox, *Labor Law Preemption Revisited,* 85 Harv. L. Rev. 1337, 1356 (1972); emphasis supplied]

This Court, moreover, has observed that this exception should be applied in situations where Congress has *"affirmatively indicated"* that the states have the power to act. *Lockridge,* 403 U.S. at 297; emphasis supplied.[29]

[29] In its recent decision in *Malone* v. *White Motor Corp.,* 46 U.S.L.W. 4295 (U.S. Apr. 3, 1978) (No. 76-1184), this Court applied this exception to a case involving the issue of whether state laws on subjects of mandatory bargaining, as defined by federal law, are subject to preemption. There the Court refused to apply preemption because Congress had affirmatively and clearly indicated in the provisions of the Welfare and Pension Plans Disclosure Act, and in the surrounding legislative history of that 1958 Act, that it wished to preserve state authority to regulate pension plans. The affirmative statutory expression found there and absent here is one of the important distinguishing features of that case from the one at bar. Yet even this affirmative indication was considered by all three dissenting Justices as insufficient to override the national labor policy barring "interference by the State with privately negotiated solutions to problems involving mandatory subjects of collective bargaining." 46 U.S.L.W. at 4300. Evidence as to "what Congress did *not* do" in the 1958 Act was rejected by the dissenters as a proper basis for inferring a positive congressional intent. *Id.* In a separate dissenting opinion, Mr. Justice Powell, with whom Mr. Chief Justice Burger joined, refused to infer Congress' toleration of the conflict between the state and federal law involved in *Malone* "[i]n the absence of congressional indication to the contrary." "Until Congress expresses its will in clearer fashion than in the ambiguous pre-emption disclaimer of the 1958 Disclosure Act, . . . federal labor policy requires invalidation of the type of statute involved in this case." *Id.* at 4300-01.



To ignore this presumption, as the court did below, is particularly destructive of the federal labor scheme in the circumstances of this case, where the state law not merely threatens to disrupt Congress' "equitably and delicately structur[ed] . . . balance of power,"[30] but also creates a proven conflict of substantial proportions with the preemptive policy which created that balance.

Legislative silence, it has been recognized, is a "'poor beacon' to follow in construing a statute," 2A Sutherland, *Statutory Construction,* §49.10 at p. 261 (4th ed. 1973), and Congress' inaction "affords the most dubious foundation for drawing positive inferences," *United States* v. *Price,* 361 U.S. 304, 310-13 (1960). Indeed, "courts are properly chary of equating mere inaction with approval, in the absence of solid foundation for the inference of conscious ratification." *Duncan* v. *Railroad Retirement Bd.,* 375 F.2d 915, 919 (4th Cir. 1967).

[30] *Lockridge,* 403 U.S. at 286.

This Court, moreover, has cautioned that the proponent of decisions such as that below, which proceed on the basis of a limitation on the scope of established federal policy, "bears a heavy burden of persuasion," *Amell* v. *United States,* 384 U.S. 158, 165-66 (1966), and cannot succeed unless legislative intent that is "clear and manifest" is demonstrated, *United States* v. *Borden Co.,* 308 U.S. 188, 198 (1939). For it is a "cardinal principle of statutory construction" that altering or narrowing the scope of an enactment by implication is "not favored," *United States* v. *United Continental Tuna Corp.,* 425 U.S. 164, 168-69 (1976). Courts must be "hesitant to infer from . . . [congressional] silence" a result which "while serving one legislative purpose will disserve" another. *Santa Clara Pueblo* v. *Martinez,* 46 U.S.L.W. 4412, 4416 (U.S. May 15, 1978) (No. 76-682).

It was in disregard of these established rules of construction, that the court below erroneously sanctioned open and substantial interference with Congress' uniform national labor policy through state unemployment compensation laws subsidizing strikers. In doing so that court was in express disagreement and conflict with the decisions of all "[t]hose courts that have considered Congress' intent with respect to the payment of unemployment benefits to strikers" (Pet. 7a).[31]

After an in-depth review and analysis of congressional intent and the very same legislative history on the subject of unemployment compensation for strikers as here con-

[31] Since the Second Circuit made this observation, a federal district court in Illinois cited with approval the reasoning and conclusion of its opinion in this case. *Olin Corp.* v. *Illinois Dep't of Labor,* 443 F. Supp. 366 (S.D. Ill. 1978).



sidered, the Court of Appeals for the First Circuit, in *Grinnell,* concluded that:

> the existing legislative record is not sufficiently clear to establish Congressional intent either way . . . . [475 F.2d at 454]
>
> The *most* that can fairly be said, in the face of this legislative record, is that Congress has been and presently is aware[32] of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances.
>
> [*U*]*nambiguous Congressional intent is lacking* . . . . [*Id.* at 457; emphasis supplied][33]

The federal district court in *Hawaiian Telco* arrived at the same conclusion: "this court agrees with *Grinnell* . . . that 'unambigous Congressional intent is lacking.'" 405 F. Supp. at 286. And so did the district court in *Dow Chem. Co.* v. *Taylor,* 57 F.R.D. 105, 108 (E.D. Mich. 1972):[34]

[32] The depth and extent of Congress' awareness of the problem, as we shall show, is questionable. It certainly was totally unaware of the substantial impact exerted by the payment in New York of unemployment compensation to strikers on collective bargaining and strikes which was proven for the first time in this case.

[33] Finding no controlling legislative intent either way, the First Circuit in *Grinnell* reversed the dismissal of the complaint which challenged payments to strikers under Rhode Island's unemployment compensation statute (almost identical to New York's), and remanded the case for trial. Its opinion blueprinted the kinds of proof on the preemption issue which should be adduced at trial by plaintiff. It is clear from the findings below in the case at bar that that proof has been supplied here. The *Grinnell* case has yet to be tried.

[34] The Michigan law which was challenged in that case barred unemployment compensation in labor disputes, but it was being circumvented. The case has survived several motions to dismiss and is now on appeal to the Sixth Circuit on a certified question concerning the applicability of this Court's summary dismissal of the

> This court does not believe . . . that congressional inaction or failure to pass particular amendments to unemployment tax laws results in a definitive statement of congressional intent.

The district court in the case at bar twice reviewed the same checkered legislative history as in *Grinnell, Hawaiian Telco* and *Dow,* and reached the same conclusion, initially on the State's motion for summary judgment, and subsequently in its decision after trial (Pet. 47a-48a, 55a-56a). Another district judge in New York, presented with the same issue of congressional intent, similarly found it inconclusive:

> Conflicting inferences may be drawn from the legislative history accompanying the federal labor laws such that congressional intent is difficult to fathom. [Mem. and Order, p. 5, *American Broadcasting Cos.* v. *New York State Dep't of Labor,* 77 Civ. 2995 (S.D.N.Y. June 30, 1977) (Cannella, J.)]

Thus, the Second Circuit's decision in this case stands virtually alone in reading the legislative history as dispositive of the preemption issue here posed.[35] The plain fact is

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appeal in *Kimbell, Inc.* v. *Employment Security Comm'n,* 429 U.S. 804 (1976), for lack of a substantial federal question. *Dow Chem. Co.* v. *Taylor,* 428 F. Supp. 86 (E.D. Mich. 1977), *certified to 6th Cir.* (E.D. Mich. May 19, 1977) (No. 77-8064).

[35] This Court summarily dismissed, for want of a substantial federal question, the appeal in *Kimbell, Inc.* v. *Employment Security Comm'n,* 429 U.S. 804 (1976), from a decision of the New Mexico Supreme Court upholding that state's payment of unemployment compensation to strikers in certain limited circumstances. That case involved a different statute and a minimal record on impact. The state court's decision on review, moreover, did not consider legislative intent. Both of the courts below distinguished *Kimbell* from the case at bar (Pet. 7a n.2, 48a-53a). The summary dismissal in *Kimbell,* of course, is not binding on this Court. *Edelman* v. *Jordan,* 415 U.S. 651, 670-71 (1974).



that Congress has not authorized the payment of unemployment compensation to strikers in the NLRA or in the Social Security Act of 1935, now the Federal Unemployment Tax Act, 26 U.S.C. §§3301-3309.

If any inferences and conclusions may be fairly drawn from the legislative history they are that (a) Congress sought in the NLRA, as one of its prime purposes, to structure a system of collective bargaining free of government interference and, in doing so, to strike its own balance among the competing interests of the respective parties in collective bargaining, all to the exclusion of state laws which seek to accommodate those same interests (*see* Point I, *supra; see also, Lodge 76, IAM,* 427 U.S. at 140 n.4, 149-51), (b) Congress never intended that states be permitted to interfere with this system, or that they be permitted to alter the balance it had so delicately struck, by way of laws granting unemployment compensation to strikers, (c) where Congress intended to assist strikers financially, it has expressly done so and (d) where it has expressly considered the issue, in setting up an unemployment insurance system for the District of Columbia, Congress determined that strikers should be denied unemployment benefits (see p. 48, *infra*).

In addition to the instances of faulty analysis previously discussed—which undermine the very foundations of the opinion below and, in themselves, call for its reversal—the Court of Appeals' opinion proceeds on the basis of numerous other errors which we shall now discuss *seriatim.*

**A. *The Opinion Virtually Ignores The History Of The NLRA And Congress' Intent, As Found By This Court, To Shield The Labor Policy Created Therein Against Offending State Unemployment Insurance Enactments.***

It is significant that the miscellaneous items of congressional history assembled by the court below include but a single reference to the NLRA as enacted in 1935.[36] The omission of any discussion of the purposes sought to be achieved by Congress in the NLRA is especially telling in a case such as this.

The opinion, instead, is almost totally preoccupied with the history, purposes, provisions and proposed amendments of the 1935 Social Security Act. It places substantial and, indeed, virtually controlling reliance on Congress' failure in that Act expressly to forbid the payment of unemployment benefits to strikers. To the court below the unemployment insurance scheme devised by Congress, with the exception of the few standards specified therein, granted to the states total freedom to set up any unemployment compensation system they wished where strikers were concerned; and each state could "serve as a laboratory" and "try novel social and economic experiments without risk to the rest of the country" (Pet. 11a).

That Congress wished to leave the question of benefits to strikers in the hands of local officials, held the Court of Appeals, may be inferred not only from the "fact that the matter has long been a political 'hot potato' ",[37] but also

[36] It notes that the NLRA "makes no mention of unemployment compensation" (Pet. 8a).

[37] This purely speculative explanation in a field where virtually every issue generates its own heat would, if adopted, invite ever-widening state incursions into the areas of federal labor law based on congressional inaction.



because "the national interest can be served as well by individual State experimentation as by enforced national uniformity" (Pet. 15a).

But had the Court of Appeals given due weight—or indeed any weight—to the objectives Congress sought to accomplish in the NLRA, it would perforce have recognized that it is "enforced national uniformity" that was and remains the guiding rationale and motivating factor underlying the federal labor laws. This Court has said that the primary factor which led Congress to enact "a comprehensive national labor law" was

> the perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflicts and for equitably and delicately structuring the balance of power among competing forces so as to further the common good. [*Lockridge*, 403 U.S. at 286]

Senator Williams, the current Chairman of the Senate Labor Committee and the chief sponsor in the Senate of the most recently enacted amendments to the NLRA concerning health care institutions, also recognized this factor in 1974, during the debate on those amendments when he said:

> [T]he general purpose of the National Labor Relations Act, as interpreted by the Board and the courts, is to attempt to establish a uniform pattern of collective bargaining rules nationwide, without local variation. [120 Cong. Rec. 22575 (1974)]

The national interest in labor relations—promoting labor peace—is not served by local "experimentation" but, as recognized both by Congress and by this Court, may be

attained only through a uniform, comprehensive national labor policy. In finding power in the states to subordinate the national labor policy to state-by-state decisions concerning the allowance of unemployment insurance benefits to strikers, the decision below attributes to Congress an intent to permit frustration of its own basic purpose in enacting a comprehensive federal labor law. There is no room for believing Congress intended to tolerate state laws, such as New York's, which deal specifically with the bargaining power of parties in industrial controversies,[38] since it was a primary objective of Congress in enacting the NLRA to protect the balance of bargaining power from such state tampering. Surely such a conflict of purpose may not be inferred in the absence of "a positive expression of congressional intent."

**B. *The Court of Appeals Did Not Consider The Importance Of The Federal Policy Into Which New York State Has Intruded Or The Extent Of That Intrusion.***

The preemption doctrine "is to a great extent the result of this Court's on-going effort to decipher the presumed intent of Congress in the face of that body's steadfast silence." *Sears,* 46 U.S.L.W. at 4448 n.12. Although

[38] The feature of New York's law disputed here (N.Y. Labor Law § 592.1 (McKinney 1977), quoted at p. 3, *supra*) is not one of general application which might occasionally be invoked in, or impact on, a labor dispute (as, *e.g.*, state laws dealing with torts and contracts, or in certain limited circumstances, state laws against trespass—as was involved in *Sears,* 46 U.S.L.W. 4446). On the contrary, the New York statute, in Section 592.1, deals specifically with the benefit rights of persons who lose employment because of industrial controversy and avowedly seeks to strike a balance among the interests of the parties to a labor dispute by withholding unemployment compensation for a fixed period and then intervening to aid the strikers at the expense of their employer. Such was the finding of the Court of Appeals (Pet. 12a n.5).



the areas preempted by the federal law, and thereby withdrawn from the states, are not "susceptible of delimitation by fixed metes and bounds," "[o]bvious conflict, actual or potential, leads to easy judicial exclusion of state action." *Garmon,* 359 U.S. at 240, quoting from *Weber,* 348 U.S. at 480-81. The Court of Appeals in the case at bar, itself having recognized the conflict between the federal labor policy and New York's law,[39] was required, we submit, to exclude the state law and affirm the District Court below.

Were the conflict not as obvious as the one here, the court would have been required, at the very least, to consider the significance of the federal policy and the extent of state interference therewith as a part of the process of "decipher[ing] the presumed intent of Congress." This is a far "more complicated and perceptive process than is conveyed by the delusive phrase 'ascertaining the intent of the legislature,' " *Garmon,* 359 U.S. at 239-40, for labor preemption questions are of a "Delphic nature, to be translated into concreteness by the process of litigating elucidation." *IAM* v. *Gonzales,* 356 U.S. 617, 619 (1958).

Yet the Court of Appeals completely withheld consideration of, or even comment on, the nature and importance of the national policy involved in this case and its central place in the labor scheme structured by Congress. It denied, moreover, adequate—or indeed any—weight in its calculations to the substantial dimensions of the interference proven below through the "process of litigating elucidation."[40] Had the court given these considerations

[39] Pet. 17a.

[40] This Court recently observed that, under the preemption doctrine, the determination of whether a state's law stands as an obstacle to the accomplishment and execution of the full purposes

the weight they deserved, and which the law commanded, it undoubtedly would have reached a different result.

### C. *This Court's Decision In* Nash *Stands Foursquare Against The Inference Drawn Below.*

The rationale of the Court of Appeals' opinion in this case is that, save for the few exceptions specifically written into the federal unemployment insurance law,[41] each state enjoys the right to establish any eligibility requirement for unemployment compensation it may wish in the area of striker benefits without regard to the federal labor policy. Focusing its attention on this mistaken notion—from which much of its analysis and reasoning proceeded—the Court of Appeals passed without mention this Court's decision in *Nash* v. *Florida Indus. Comm'n,* 389 U.S. 235 (1967), discussed *supra,* at pp. 27-29. That case, we submit, is dispositive in principle of the case at bar.

In *Nash* this Court ruled that the states are *not* free to establish unemployment compensation eligibility requirements which "frustrate" the purposes of the national labor legislation or stand as an "obstacle" to their full accomplishment. 389 U.S. at 240. There, as here, this Court was called upon to assess the consequences of a conflict in policy between the federal labor law and a state's unemployment compensation law. The decision reflected this Court's determination to carry out the intent of Congress

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and objectives of Congress and, accordingly must give way, "requires us to consider the relationship between state and federal laws as they are interpreted and *applied,* not merely as they are *written.*" *Jones* v. *Rath Packing Co.,* 430 U.S. 519, 526 (1977) (emphasis supplied).

[41] These exceptions are set forth in the Court of Appeals' opinion at Pet. 9a. They merely protect claimants from the denial of benefits for refusing to accept *new* work under certain specified conditions.



to outlaw all state unemployment insurance statutes which tend to "frustrate" the purposes of the federal labor legislation.[42] Had the Court of Appeals applied this restriction to New York's unemployment compensation law, it would have been constrained to affirm the District Judge's injunction against New York's interference with federal labor policy.

### D. *Enactment Of The NLRA And Social Security Act of 1935.*

When Congress enacted the NLRA on July 5, 1935, New York's unemployment compensation statute was but two months old, having been passed April 25, 1935.[43] It was at that time the only state law providing benefits to strikers (originally only after a 10-week waiting period) of the approximately eight state laws passed in anticipation of the federal Social Security Act. At the time of this enactment, New York's law provided for a statewide pooled fund of employer contributions but employer contribution rates were *not* to be set by experience rating.

Neither the events occurring about the time of enactment of the NLRA nor their sequence suggest, much less

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[42] The state unemployment compensation eligibility requirement preempted in *Nash* was, as here, one that dealt with labor disputes. It, however, was applied to bar a claimant from benefits because she filed an unfair labor practice charge at the NLRB. That the offending eligibility requirement in *Nash* led to a denial of benefits, while the one at issue here granted benefits, is of no consequence. Nor is it relevant that different federal labor policies are involved in the two cases. What is significant is the principle laid down in *Nash* that state unemployment insurance laws must yield to federal superintendence in the labor field.

[43] The Court of Appeals erred in stating that the New York statute took "effect" on this date. The taxing provisions of the statute did not take effect until January *1936* and benefits to eligible claimants, including strikers, were not paid until after January 1, *1938,* several years after the NLRA was enacted.

support, a finding that Congress intended by that act to give the states free rein in establishing unemployment compensation to strikers payable out of their employer's pocket since (1) Congress' attention in legislating the federal labor scheme was on structuring a national policy concerning labor relations and not on state unemployment insurance statutes, (2) there is no evidence in the history surrounding the enactment of the NLRA or in the legislative reports concerning that Act that Congress, in 1935, was actually aware of the strike provisions contained in the New York law, and none was cited in the opinion below, and (3) New York did not begin paying benefits or introduce experience rating until years after the NLRA was enacted.

To say under these circumstances that Congress intended to tolerate the destructive impact found below in this case on one of its most significant policies, when the impact was not even apparent until long after the law embodying that policy was adopted, is a pure *non sequitur*. Moreover, the New York statute creating the impact itself has been materially changed on numerous occasions after the NLRA was adopted. The nature and import of some of these changes is discussed at greater length at pp. 50-52, *infra*.

Similarly, no inference of congressional approval of New York's subsidization of strikers may be drawn from the history surrounding the Social Security Act. Congress did not anticipate that unemployment compensation programs would be extended by the states to strikers. The entire unemployment insurance system was established in response to the experience of the Great Depression of the early 1930's. The problem of unemployment at that time had become "national in area and dimensions" and there



"was need of help from the nation if the people were not to starve." *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 586 (1937) (per Cardozo, J.). The Social Security Law of 1935, which set up the program, was to "cushion the shock of seasonal, cyclical, or technological unemployment" for those involuntarily unemployed. *Minter,* 435 F.2d at 994-95. This Court described the objective of the 1935 Social Security Act as follows:

> The objective of Congress was to provide a substitute for wages lost during a period of unemployment *not the fault of the employee.* [*California Dep't of Human Resources Dev.* v. *Java,* 402 U.S. 121, 130 (1971); emphasis supplied]

Strikers do not fall within the contemplated category of beneficiaries described above. Thus their eligibility in New York for unemployment compensation not only runs counter to the NLRA, but also expands and, in the process, subverts the purposes envisioned by Congress in enacting the federal unemployment insurance system. This expansion is not authorized by the 1935 Social Security Act or by any other federal law.

This conclusion is confirmed by the fact that the American system was patterned after the British Unemployment Insurance Act as it existed in the middle 1930's and that legislation made no general provision for the payment of benefits to strikers: "If unemployment was the result of a labor dispute, it was not compensable." Haggart, *Unemployment Compensation During Labor Disputes,* 37 Nebr. L. Rev. 668, 686-87 (1958). The only exception was where the striker was terminated and his job was filled. *See Hawaiian Telco,* 405 F. Supp. at 287.

It was not unexpected then that in 1936 the independent federal Social Security Board (which in its advisory role was called upon to draft a model unemployment insurance bill to aid the states in drafting legislation to conform with the federal enabling law) drafted a model which expressly denied benefits to strikers. Social Security Board, Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Types, §1(5) (rev. ed. Jan. 1937). This is especially significant because the Social Security Board was presumably aware of the legislative history and background of the Social Security Act and in drafting its model bill had undertaken to follow the will of Congress. The striker disqualification contained in the model bill was followed in virtually all of the states.[44]

Consistent with, and we believe supportive of, the proposition that Congress never intended the states to use the unemployment compensation system to subsidize strikers, is the fact that when Congress acted to legislate a local unemployment insurance law for the District of Columbia it enacted a law which *denied* benefits to strikers.[45]

---

[44] Only two states, Rhode Island and New York, pay strikers benefits outright in all strikes after a fixed waiting period. Some other states, like Hawaii, have laws which generally deny benefits except where an employer operates its business during the strike to 80% or more of capacity.

[45] Currently the law in the District of Columbia provides (D.C. Code § 46-310(f)):

> An individual shall not be eligible for benefits with respect to . . . [unemployment] as a result of a labor dispute still in active progress . . . .

Since 1935, the law in the District of Columbia, although amended, has always excluded strikers, Act of Aug. 28, 1935, ch. 794, § 10(a), 49 Stat. 950; Act of June 4, 1943, ch. 117, § 10(f), 57 Stat. 115; and Act of Aug. 31, 1954, ch. 1139, § 10(f), 68 Stat. 995.



The District of Columbia's law, enacted almost *simultaneously*[46] with the Social Security Act of 1935, was viewed by Congress as "putting into effect the provisions of the social security bill in regard to unemployment compensation for the District of Columbia" and was intended to "serve as a model to the States, to guide them in the enactment of unemployment compensation legislation." H. Rep. No. 858, 74th Cong., 1st Sess. 8 (May 9, 1935). In this "beacon light" for the states, Congress provided that an applicant for unemployment compensation "must not be engaged in a strike." 79 Cong. Rec. 8274, 74th Cong., 1st Sess. (May 27, 1935) (comments of Rep. Ellenbogen, the bill's manager).

The Court of Appeals brushed aside or simply ignored these developments which, if properly weighed and viewed in historical context, clearly militate against inferring congressional approval of benefits to strikers from the Social Security Act's silence on that subject. Instead, it found "particularly noteworthy" Congress' presumed awareness of New York's statute when it enacted the 1935 Social Security Act and saw as significant the fact that that legislation did not expressly exclude benefits to strikers, although Congress had been "urged to do so" (Pet. 10a-11a).

The *sole* basis for the finding that Congress was even aware of New York's law in 1935, cited in the opinion below, is Senate Report No. 628, 74th Cong., 1st Sess. 11 (1935), which accompanied the Social Security Act. While this Report refers to New York's law (as well as to other state laws) in several different contexts, *it does not contain any reference whatsoever to the striker benefit provision of the New York law.* Nor does the Report discuss or consider

---

[46] The Social Security Act was enacted nine days after the District of Columbia's law.

the problem of unemployment compensation for strikers, either in general or in the context of specific state laws.

Even were Congress aware in 1935 of the striker benefit provision of New York's law, it would not have given Congress the slightest clue to the way in which subsequent amendments and increasing resort thereto were to balloon the impact of those striker benefits into the highly significant proportions shown in this case and recognized by labor unions generally (see pp. 7-17, *supra*). The New York law, as it existed in 1935, provided for a ten-week waiting period for strikers and no benefits were payable to anyone under it until more than two years later. It was not until 1945 that the law was changed to permit strikers to collect after only eight weeks. The maximum tax-free weekly benefit payable to strikers under the 1935 law was $15, with eligibility extending for up to 16 weeks. During the CWA strike involved in this case, maximum benefits were $75 payable for up to 52 weeks. Maximum benefits today are $115, increasing to $125 in September 1978, and are normally payable for at least 26 weeks. Over the years, the duration of benefits has been extended for as much as 52 weeks under extended benefits legislation. N.Y. State Dep't of Labor, A History of Unemployment Insurance Legislation in the United States and New York State 1935-1973 (Dec. 1973); N.Y. State Dep't of Labor, Labor Research Report 1977—No. 87: Historical Review of The Unemployment Insurance Program In New York State, 1935-1977 (Oct. 1977).

The experience rating system for setting tax rates (which, as previously noted, acts as the conduit through which struck employers are called upon to finance their striking employees) *was not adopted by New York until as late as*



*1951,* 16 years after the NLRA and Social Security Act were enacted. The taxable wage base of employer payrolls on which the tax rates were applied increased from $3,000 in 1938 to $4,200 in 1972 and to $6,000 in 1978 (*Id.*).

One of the drafters of New York's original law (called as a witness by the State) conceded he did not foresee the growing and changing impact of the strike benefit provisions on collective bargaining and strikes flowing from some of the foregoing amendments.[47] In 1946, Dr. Gray, then Chairman of New York's Unemployment Insurance Advisory Council, wrote:

> When the law was amended in 1941 by reducing the suspension period from 10 weeks to 7 weeks, it was argued that a shorter suspension period was warranted in view of the fact that the duration of strikes seldom, if ever, exceeded 7 weeks. Recent experience has demonstrated that many strikes have continued for periods beyond the 7 weeks' period.
>
> During 1946 approximately 2½ million dollars in benefits was paid to about 51,000 persons unemployed because of strikes beyond the seven-week suspension period. . . .
>
> The present provision of the law which permits workers who voluntarily become unemployed because of a strike, to receive benefits during the pendency of the strike runs counter to the objective of the law which is "the compulsory setting aside of financial reserves for the benefit of persons unemployed through no fault of their own." . . . Unemployment Insurance benefits, as such, should not be used as an instrument

[47] Thus, in *1935,* he had forecast incorrectly that strikes of more than ten weeks "would be unusual" and, therefore, "[t]here is . . . little likelihood that the benefits will be used to finance a strike." Gray, *Unemployment Insurance In The State Of New York,* 1935 N.Y.U.L.Q. Rev. 19, 32. *See* A. 367-68. He later was proved wrong and recommended discontinuance of striker benefits in New York State.

> for either party involved in a labor dispute. [Report of the New York State Unemployment Insurance Advisory Council for the year 1946, p. 5; *see* A. 368-71]

Edmund Witte's testimony (as Executive Director of the President's Committee on Economic Security) urging a bar against striker benefits before the Senate Finance Committee during hearings on the 1935 Social Security Act, was, we submit, accorded probative weight by the court below out of all proportion to its significance. Statements of witnesses before congressional committees ordinarily are given little, if any, weight by courts in determining congressional intent. Indeed, the statements of legislators themselves are often totally ignored by courts because they are not particularly revealing of the intent of Congress as a whole, with the exception of legislators who drafted or sponsored the bill. *E.g., McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 493-94 (1931), and cases cited therein. The district court in *Hawaiian Telco* saw such testimony as not significantly revealing on the question of Congress' intent:

> Careful examination of the legislative record, however, does not reveal whether Congress ever expressly considered these recommendations . . . . [405 F. Supp. at 285]

**E. *The 1947 Taft-Hartley Amendments.***

The court below cited as support for its conclusion, a 1947 proposal, deleted without comment by a congressional conference committee, which would have excluded a striker collecting unemployment compensation from all rights under the NLRA as amended. The significance of this deletion was correctly assessed by the First Circuit in *Grinnell*:



> Given this silence, the enormous political controversy surrounding the Taft-Hartley Act, and the consequent need for compromises, perhaps unreasoned or hasty, we cannot read this deletion and the subsequent approval of the conference bill as specific congressional resolution of the problem. [475 F.2d at 455][48]

There are an unlimited number of possible explanations of why the proposal did not emerge from the conference committee. Whatever the true explanation may be, its relevance in determining the presumed intent of Congress formed in the controlling year of 1935 when the NLRA and Social Security Act were enacted, is questionable. This Court has frequently observed that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Price*, 361 U.S. at 313.

**F. *The 1969 Proposal To Amend The Federal Unemployment Tax Act.***

The court below also relied on Congress' failure in 1969 to adopt President Nixon's proposal to prohibit the payment of benefits to strikers. The entire bill, of which this proposal was but one part, was not enacted. As previously discussed with regard to the 1947 proposal made in connection with the Taft-Hartley amendments, evidence concerning the intent of a subsequent Congress forms no basis for inferring the intent of an earlier one. And as already discussed in detail, congressional silence or inaction is a poor guide to legislative intent.

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[48] Even within the House, its Majority and Minority Committee Reports, as noted by the court below, read the legislative history concerning this problem in markedly different ways (Pet. 13a), and the Senate version of the law was silent on the subject.

As for Committee Chairman Wilbur Mills' statement, the *Grinnell* court wrote:

> We are aware of the importance and power of the House Ways and Means Committee and of the significance of its Chairman's statements on bills within its jurisdiction. Yet, in the absence of any floor amendment or debate related to that particular change in either house, and of any real consideration of the issue at any level in the Senate, we cannot take the House Committee's deletion and Congress' subsequent approval of the substitute bill, as a clear indication of the intent of the entire Congress not to preempt unemployment payments to strikers. [475 F.2d at 456]

When viewed against the strong federal policy protecting the collective bargaining process from state interference, the failure of scattered bills offers insufficient probative evidence from which a conclusion can be drawn that Congress consciously elected to permit state interference with the federal labor scheme in this area.[49]

### G. *Misplaced Reliance By The Court of Appeals On The Hodory Opinion.*

The Second Circuit's reliance on this Court's decision in *Ohio Bureau of Employment Servs.* v. *Hodory,* 431 U.S. 471 (1977), is misplaced. *Hodory,* addressing a constitutional question under the Fourteenth Amendment, merely holds that Ohio's denial of unemployment compensation to "innocent bystanders" (*viz.,* non-striking employees laid off

[49] The Second Circuit itself observed in an earlier preemption case that " 'unsuccessful attempts at legislation are not the best guides to legislative intent'—certainly not as to the intent of . . . [a prior] Congress which passed the legislation here at issue." *Wisdom* v. *Norton,* 507 F.2d 750, 757 (1974) (footnotes omitted), quoting in part from this Court's opinion in *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 382 n.11 (1969).



in another establishment), while granting benefits to locked-out employees, was not so irrational as to violate the Equal Protection Clause of that amendment. The only claim of federal preemption considered in that case was that

> neither the Social Security Act nor the Federal Unemployment Tax Act intended to restrict the States' freedom to legislate in this area. [431 U.S. at 488-89]

Indeed this Court, in *Hodory,* explicitly reserved the labor law preemption issue for another day. 431 U.S. at 475 n.3.

The passage from *Hodory* quoted in the opinion below (Pet. 9a-10a) (when "Congress wished to impose or forbid a condition for [unemployment] compensation, it was able to do so in explicit terms") was relied upon by the court to support the proposition that, in the absence of an explicit provision forbidding compensation to strikers, congressional tolerance of such payments must be inferred, regardless of their adverse impact on the federal labor policy. If the quoted passage from *Hodory* permitted such a conclusion, however, there would have been no need to reserve the labor preemption question. Moreover, such a reading is at odds with the Court's holding and analysis in *Nash.* The plain fact is that Congress in the 1935 Social Security Act did not authorize any interference with or frustration of its national labor policy.[50]

[50] The Court in *Hodory* recognized the potential impact of a state's grant of benefits in strike situations:

> The only way for the employer to stop these rising costs is to settle the strike so as to return the employees to work. *Qualification for unemployment compensation thus acts as a lever increasing the pressures on an employer to settle a strike.* [431 U.S. at 492; emphasis supplied]

**H. *When Congress Intended To Grant Assistance To Strikers, It Was Openly Provided In Express Terms.***

The Second Circuit's reference to other laws wherein Congress *expressly* permitted financial aid to strikers (Pet. 15a-16a) provides no support for its conclusions in this case and, indeed, cuts the other way.

The congressional scheme enacted in the Railway Labor Act, 45 U.S.C. §§151 *et seq.*, ("RLA") is entirely different from that in the NLRA. It provides the machinery for substantial government intervention, up to and including mediation, arbitration, and the formation of Emergency Boards, rather than the free collective bargaining envisioned by the NLRA. Congress granted unemployment benefits *only* to striking railway employees who follow the procedures mandated by the RLA. Otherwise, no benefits are paid. 45 U.S.C. §354; *Railway & S.S. Clerks* v. *Railroad Retirement Bd.*, 239 F.2d 37 (D.C. Cir. 1956).

This is in marked contrast to the fuller freedoms to strike and bargain under the NLRA without exhausting or being interfered with by governmental "procedures" and actions.[51] The District Court below noted that the labor scheme created by Congress for the railroad industry, with its "elaborate statutory machinery provid[ing] for substantial government intervention in the *entire* strike process . . . rather than the free collective bargaining envisioned by the

[51] That the scheme in the RLA has resulted in other than free collective bargaining is emphasized by the recommendation to Congress in 1971 by the then Secretary of Labor James D. Hodgson that the scheme be altered by discontinuing payment of unemployment compensation to strikers because of its interference with free collective bargaining. Statement of Secretary of Labor James D. Hodgson on June 15, 1971, before the Senate Labor Subcommittee on S. 560, The Emergency Public Interest Act. The entire bill, of which this was but one part, failed to pass.



NLRA," presents a "unique situation" which is not analogous to that presented in this case (Pet. 47a-48a; emphasis court's; footnote omitted).

The true significance of the RLA here is that when Congress intended to grant unemployment compensation to strikers it did so, openly, clearly and affirmatively. The states may not treat its failure to do so as to other strikers as a vacuum which they may enter at will and on their own terms.

Congress has also affirmatively acted in another area to permit financial assistance to strikers and to accommodate the federal labor policy to other objectives. Thus in situations of total economic deprivation, and upon a showing of *need*, Congress has provided for the disbursement of food stamps. Food Stamp Act, 7 U.S.C. §2011.[52]

Thus where Congress by the grant of public assistance to strikers intended to alter the collective bargaining balance which it had created under the federal labor laws, it has expressly so provided. Its failure here to do so manifests an intention not to do so. *Cf. California* v. *Taylor*, 353 U.S. 553, 564-65 (1957).

**I. *The Age of New York's Law.***

The Second Circuit's reference to the age of New York's law does not increase the "probative value" of Congress' inaction as the court apparently believed (Pet. 16a). For

[52] States, however, may under existing HEW regulations deny welfare benefits to dependent children of indigent strikers. *Batterton* v. *Francis*, 432 U.S. 416 (1977). This Court, while upholding these regulations under the federal welfare laws, refused to decide and expressly left open the question of the validity of welfare payments to strikers under the federal labor laws. 432 U.S. at 424 n.7.

the law on preemption is replete with examples of state laws preempted after the passage of extensive periods of time. The several state enactments preempted in *Garmon, supra,* ranged (at the time of this Court's decision in 1959) anywhere from 12[53] to 26[54] to 87[55] years of age. The pre-empted state laws nullified by this Court's decisions in *Lockridge, Morton* and *Weber, supra,* were Idaho's common law of contract, Ohio's common law of secondary boycotts and Missouri's common law of secondary boycotts, respectively. A 27-year old law was preempted by this Court in *Beasley* v. *Food Fair, Inc.,* 416 U.S. 653 (1974), and one of 16 years' vintage was nullified in *Street, Elec. Ry. & Motor Coach Employees, Div. 1287* v. *Missouri,* 374 U.S. 74.[56]

It would seem that the preoccupation of the opinion below with the passage of forty years since enactment of New York's statute blinded it to the perceptions which the trial record in this case yielded as to the extent of that statute's infringement upon modern-day collective bargaining.

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[53] California Labor Code §§ 1115-18.

[54] California Labor Code § 923.

[55] California Civil Code § 1708.

[56] The First Circuit struck down Massachusetts labor laws ranging from 22 to 52 years of age in *General Elec. Co.* v. *Callahan,* 294 F.2d 60 (1961), *cert. dismissed,* 369 U.S. 832 (1962). And in *Oil, Chem. & Atomic Wkrs.* v. *Arkansas Louisiana Gas Co.,* 332 F.2d 64 (10th Cir. 1964), a federal court nullified a state statute 56 years old on labor preemption grounds.



## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Second Circuit Court of Appeals should be reversed.

Dated: New York, New York
June 12, 1978

Respectfully submitted,

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Supreme Court, U. S.
FILED
AUG 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

*against*

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-961

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NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

*against*

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## BRIEF FOR RESPONDENTS

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### Questions Presented

1. Whether, in view of the federal-state program established through the Social Security Act by Congress at the same time as it created the National Labor Relations Act, the wide range of judgment left to the States under this program, and congressional awareness of New York's statute which predated the federal enactments, the Court of Appeals for the Second Circuit correctly refused to create

a judicial bar to the implementation of New York's unemployment insurance law as it relates to strikers?

2. Whether, in view of the extensive evidence that Congress has not considered the denial of unemployment compensation to strikers to be essential to governmental neutrality, the Court of Appeals for the Second Circuit correctly refused to create a judicial bar to the implementation of New York's unemployment insurance law as it relates to strikers?

3. Whether the Eleventh Amendment applies to suits for money damages against the New York State Department of Labor and Department of Taxation and Finance, seeking return of taxes paid to the State's Unemployment Insurance Fund?

## Statement

### A. The Nature of the Proceeding

This action was filed by the New York Telephone Company, Western Electric Company, American Telephone & Telegraph Company, Long Lines Department, and Empire City Subway Company (Limited) (hereinafter "petitioners" or "Telco") in 1973, attacking New York Unemployment Insurance Law Section 592.1 which prohibits the payment of unemployment benefits for the initial seven weeks after the commencement of a strike, lockout, or other industrial controversy and permits the accumulation of such benefit rights after this suspension period subject to the requirement of availability and capability to work and other eligibility prerequisites.

Telco claimed that the payment of unemployment insurance benefits to strikers after the lengthy disqualification period, contravenes the federal labor policy and frustrates the operation of the National Labor Relations Act, *as amended*, 29 U.S.C. 151 *et seq.*, in violation of the Supremacy Clause of the United States Constitution and, in addition, that the State statute violates the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. Telco seeks injunctive and declaratory relief and damages. See Complaint herein. (Appendix 9-33).*



Defendant state officials (hereinafter "respondents") alleged, *inter alia*, that the National Labor Relations Act contains no provision which is in conflict with § 592.1 of the New York Unemployment Insurance Law, and Congress has refused to amend the law so as to bar the State enactment; that Telco had sustained no legally cognizable damage by virtue of this statute or any action of defendants; and that since New York State has not consented to a suit for money damages in federal court, the case falls squarely within the prohibition of the Eleventh Amendment (A. 34-47).

Respondents moved for summary judgment on September 27, 1974, on the grounds that since petitioners had shown no violation of federal law, there was no basis for judicial intervention by the federal courts. The motion was denied in a brief opinion dated March 26, 1975 (Petition 55a-56a).**

On May 23, 1977, the District Court held the New York statute invalid under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, as an unconstitutional infringement upon federal labor policy. (Petition 23a-54a), reported at 434 F. Supp. 810.

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* Hereinafter, references to page numbers in the Appendix will be prefaced by "A."

** Hereinafter, references to the petition will be prefaced by "Pet."

The Second Circuit unanimously reversed and held (Meskill, J.):

> "Congress has not expressed an intent to preempt State unemployment compensation laws that provide benefits to strikers. Quite to the contrary, it has evinced an intention to leave the States free to regulate in this area." (Pet. 17a)

**B. The Facts**

The New York statute violates no provision of the National Labor Relations Act, and therefore the requirements of the national regulatory scheme must be determined by examination of pertinent legislative history. The facts concerning the CWA strike, and the duration of strikes in New York generally, are irrelevant to the legal issues confronting this Court. However, these facts will be fully set out as part of the Statement herein. Analysis of the evidence demonstrates that the factors involved are immensely complex, and that a trial is a particularly unsuitable vehicle for reaching a determination on a preemption claim.

In addition, since the undisputed statistical data on strike duration overwhelmingly contradicts the assumption that the New York statute has a significant impact on the outcome of collective bargaining, the District Court's conclusion that petitioners had sustained their burden of proof was clearly erroneous. *United States* v. *Gypsum Co.*, 337 U.S. 364, 395-396 (1948).

**1. The Statute: Unemployment Insurance Law § 592.1**

The "significant impact" which New York's law is alleged to have had on petitioners in the forty years in which this statute has existed in substantially the same form, is the development of a single strike exceeding the eight week suspension and waiting period. Petitioners contend that but for the availability of unemployment benefits in New



York,* the Telco employees would have ratified the pattern contract negotiated in July, 1971 in connection with the nation-wide Bell System strike. The facts rebut this assumption. In the numerous States** which provide for unemployment benefits during a strike where an employer (such as a telephone company) continues in substantial operation, the Bell System employees ratified the national contract. Employees in these other States would have been paid unemployment compensation from the outset. Yet it was the New York employees who were barred from such payments for the first eight weeks who voted to strike, while those whose States' unemployment benefit provisions gave them the greater advantage voted to accept the company's offer.

**2. Financial Factors During the Strike**

Although the Telco employees would have been eligible for unemployment insurance for many more months at the time of settlement, they agreed to a contract which was substantially the same as the one originally offered (Tr. 177-178). It differed from the wage increase in the original pattern settlement by a maximum of $1.50 *per week* for some upstate employees in the top crafts (Tr. 105-106, A. 412-413) and the Saturday differential pay was not sub-

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* The maximum, erroneously cited by the District Court as $95 weekly (Petition 28a) was $75 per week (Trial Transcript, p. 776 [hereinafter "Tr."]) and even this was available only to employees whose base salary was at least $149 per week. Petitioners supply this Court (p. 6) with the maximum as of September, 1978, but omit the fact that employees must earn at least $249 weekly to be eligible for this maximum.

** E.g. Illinois, Indiana, Maine, Massachusetts, New Hampshire, Vermont, Pennsylvania and New Jersey. Defendants' Exhibit 1, "Comparison of State Unemployment Insurance Laws," United States Department of Labor, Manpower Administration, Unemployment Insurance Service (January 1972) Table 405 (hereinafter "U.S. Labor Dept. Chart, Defs. Ex 1"), (A. 248-251).

stantial (A. 413). A provision for an agency shop was of marginal interest to the striking union members (Tr. 923), since it did not involve their wages or working conditions. Moreover, the original contract had already provided for a modified agency shop, which would have applied to all new employees (A. 304).

Indeed, Telco's own statement and outline drafted for the federal Wage Board after the strike described the settlement as follows: "All terms [are] generally identical with the pattern of those of other Bell System companies," and the slight additions to the pattern "are insignificant especially when one considers that their percentages are significantly reduced for the first year of the contract because of the seven months' strike." (A. 413; Defs. Ex. 77, A. 265-270).

Telco settled the strike in February, 1972. This date bore no relation to the time when the employees became eligible for unemployment benefits (September, 1971), nor to the time they would have ceased to be eligible (July, 1972) (A. 400-401).*

Moreover, although Telco refers (p. 26) to "continuing financial pressure" as a result of unemployment insurance tax payments, there was *no* financial pressure on Telco as a result of the strike. Dr. William Melody of the University of Pennsylvania** testified that the same instrumentality—

* Petitioners (p. 8) and *amicus* Chamber of Commerce (p. 23) state that the Telco strike was declared illegal by the National Labor Relations Board. However, petitioners concede (Pre-trial Order, ¶ 32, A. 57) that the basis for the finding was the union's failure to give 60 days' notice of the proposed termination of the contract under 8(d) of the Labor Management Relations Act. 8(d) is a technical provision unconnected with the issues in the strike.

** Dr. Melody has been an associate professor of communications economics at the School of Communications of the University since 1971, and prior to that (1966-1970) was a senior economist at the Federal Communications Commission (A. 391-392).



the strike—acted in opposite directions to increase Telco's unemployment insurance tax while greatly decreasing its payroll expenses as it continued to receive revenues. Dr. Melody's "ballpark" (Tr. 710) estimate was that the total in wages not paid during the strike was $199 million for the New York Telephone Company and $231.5 million for the four plaintiffs combined (A. 392-394). The wages not paid by Telco summed to approximately $86 million *after* subtraction of overtime and other expenses incurred above the norm during the strike* (A. 394). This amount was greater than the benefits paid by an enormous margin.

### 3. The Statistics

Petitioners allege that the challenged provision has had a substantial and prohibited impact on strikes and settlements. This must be determined by objective data, not by assumption or by "truisms".

What are the statistics? As shown by Dr. Samuel A. Richmond, who is Dean of the Graduate School of Management of Vanderbilt University, a former Director of the American Statistical Association and author of a leading text on statistical analysis,** New York has a *shorter* average strike duration than the average for other States (A. 291, Tr. 1374). Petitioners dealt with this by arguing that it is only strikes of over eight weeks which are "lengthened"

* The effect of the strike on revenues was very minor, according to Telco data (Tr. 701, 702, Defs. Exs. 100, A. 276-290).

** (A. 475-477). At the time of trial, Dr. Richmond was a professor of economics and statistics at the Columbia University Graduate School of Business. His study of the period from 1965-1974 rebutted petitioners' witness Dr. Lewis Perl's analysis of a five year period. Dr. Perl subsequently reported the same statistical results as to the ten-year data which had been set out by Dr. Richmond. Defs. Exs. 113-A and 113-B (A. 291-293). The District Court did not mention Dr. Richmond or his testimony in its opinion.

because of unemployment insurance payments. However, the data for this category are equally unhelpful for petitioners' purposes. When strike duration statistics are analyzed by state *and industry,* the data show that the average strike duration for all industries in the over-eight-week group is 14.80 weeks (A. 479). Those industries which in all other States had longer strikes than this average had *shorter* strikes in New York (A. 481, Defs. Ex. 122-A, A. 295-296).*

Dr. Richmond also tested Telco's claim (A. 470-471) that unemployment compensation produces a different strike duration pattern in States paying it than in those which do not pay it. He compared statistics for New York and Rhode Island, the only States which have laws providing for payment of unemployment insurance to striking workers after an initial suspension period, with those of other States. See *Grinnell* v. *Hackett,* 475 F. 2d 449 (1st Cir. 1973), at 459. Far from demonstrating any common pattern among the States with the law in question, the data show that for a ten-year period in all four categories, New York and Rhode Island act in opposite directions when compared separately to all other States: where New York is less than "all others," Rhode Island is greater, and vice versa.**

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* Omitting the industry factor is a less exact method. *Cf. Grinnell Corp.* v. *Hackett,* 475 F. 2d 449, 459 (1st Cir.), *cert. den.* 414 U.S. 858, 879 (1973). The result under petitioners' method of analyzing the data by State without the industry breakdown, also fails to support their claims. New York is sixth out of 50 in duration over a 10-year period (and virtually the same as the seventh state Virginia), and Rhode Island (whose statute is like New York's) is 29th. (Defs. Ex. 113-B, A. 292-293).

** Comparing the average duration or percentage of strikes in New York with the average of "all other" States combined, Dr. Richmond found that New York has 1) shorter strikes, 2) shorter strikes of eight weeks or less, 3) longer strikes of more than

*(footnote continued on following page)*



Although Telco had itself introduced separate statistics on Rhode Island, it argued (Tr. 1346) that there were too few strikes there from which to draw comparisions, and proceeded to add the New York and Rhode Island figures together. This had the effect of "submerging the Rhode Island data and causing us to lose exactly what we are looking for, namely, any evidence of a common pattern."*

Thus, Telco's theory that strike duration is affected by New York's payment of unemployment benefits to striking employees after an eight week suspension and waiting period runs counter to the data in every category, whether New York is compared alone against "all others," or evaluated under Telco's "common pattern" claim (A. 477-482; Tr. 1381-1382, 1390, 1393).

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*(footnote continued from preceding page)*

eight weeks, and 4) a higher percentage of strikes under eight weeks. (Tr. 1374, Defs. Ex. 113-A, A. 291, Plaintiffs' Exhibit [hereinafter "Pls. Ex."] 407.) Rhode Island's duration figures show a contrary pattern. (A. 472-473, Defs. Ex. 113-A, A. 291, Pls. Ex. 407, A. 246.) New York's duration differs from Rhode Island's to a statistically significant extent in the second and third categories (A. 472-473). When New York and Rhode Island are compared on Defs. Ex. 113-B, which sets out each state's average duration of strikes of over eight weeks, they again relate in opposite ways to the States which do not have this kind of unemployment insurance law (A. 292-293). Petitioners' witness Dr. Perl conceded the correctness of these conclusions (A. 470-473).

* (Testimony of Dr. Richmond, A. 481). He noted further that there were 350 strikes in Rhode Island for the 1965-1974 period, 46 of which lasted over eight weeks (A. 478). In virtually any book on statistics, "one will find that thirty is the dividing line between a small sample and a large sample" (A. 478). Indeed, the lack of any effect of the unemployment benefit statute can also be seen in the statistics showing that New York had a smaller proportion of strikes lasting more than eight weeks than "all others" and Rhode Island had a larger proportion than "all others"—Rhode Island had *350* strikes with which to calculate this result (Defs. Ex. 113-A, A. 291).

Petitioners' brief avoids the subject of strike length statistics, although strike duration would be precisely the area where the "significant impact" generally alleged by Telco would be seen—if the New York law created such an impact. The only reference to the data in petitioners' brief (p. 15) is a reiteration of their witness Dr. Perl's assertion that without the unemployment insurance law, 933,000 fewer man-days would be lost each year, "which would constitute a 15% reduction in man-days lost due to strikes in New York." This assertion is mathematically incorrect even under petitioners' own theory. Telco alleges that unemployment insurance payments cause earlier settlements of strikes which would otherwise last 8 weeks (Tr. 1239-1241); these strikes are thus shorter than they would have been. There is, therefore, no net loss of man-days even under petitioners' rationale.

Petitioners' entire approach is grounded on the idea that without public subsidies, workers will be unable to "meet their ongoing needs" for any substantial period of time during a strike (A. 330). But strike duration statistics have no correlation to the granting of public benefits of any kind. 12.91% of all strikes in States outside New York and Rhode Island go beyond eight weeks, and have a mean duration of 15.0 weeks (Defs. Ex. 113-A, A. 291). How do liquid assets materialize for the employees engaged in these long strikes? Welfare payments do not provide the answer to this question. The majority of States grant General Assistance to strikers (Pls. Ex. 261, pp. 14-15). However, some of the States where the average length of strikes of over eight weeks is exceptionally high, provide *neither* unemployment insurance, nor assistance to unemployed fathers (AFDC-U) nor General Assistance to strikers. South Carolina, Louisiana, and North Carolina, for example, which do not grant any of these three forms of public benefits, have strikes with an average length of



16.673, 15.228, and 16.882 weeks respectively, in the over-eight weeks category.*

Thus, workers in the long strikes in States outside of New York and Rhode Island can continue for 15.0 weeks—and more than 15.0 weeks in States that provide no welfare assistance—utilizing alternate sources of income. Such alternatives would also be available from the outset of the strike. Therefore, the key determinant of the employees' decision to strike or return to work is the issue at stake. Where the issues are intractible, workers will maintain a strike and find sources of income regardless of the "relatively small" liquid assets they may have, or the State in which they reside.

This was the testimony (A. 431-432, 451-452, 470) of Dr. James W. Kuhn, Vice Dean of the Columbia University Graduade School of Business, who has been a professor of industrial relations on the Columbia faculty for more than 20 years. He was also senior staff economist for the Council of Economic Advisors, which advises the President of the United States on all economic matters of national importance, and reported to the President weekly and almost daily on industrial relations and collective bargaining developments (A. 421-423).**

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* Defs. Ex. 113-B (A. 292-293), Pls. Ex. 408 covering a ten-year period. The States of South Carolina, Louisiana, and North Carolina do not grant unemployment benefits during strikes (Defs. Ex. 1, A. 248-251; N.C. Gen. Stat. § 96.14(5), Repl. 1975), nor AFDC-U (Pls. Ex. 261, p. 245) nor General Assistance, which is limited to the aged, handicapped or mentally ill (14 S.C. Code § 71-131 [1962], 14 S.C. Code § 71-131.1 [1975 Supp.]); 24 La. Rev. Stat. Ann. § 46.464 (1950); N.C. Gen. Stat., Vol. 3A (1975 Repl.), § 108.62). North Carolina does not prohibit the use of solely county funds for other programs. As to AFDC (as distinct from AFDC-U) it is restricted to families with disabled or absent fathers and is therefore not useful to strikers. Pls. Ex. 261, p. 11.

** Dr. Kuhn served both under President Johnson and President Nixon (A. 422).

Dr. Kuhn found that if a strike continues for more than eight weeks a particularly intractible issue must be at stake, since the employees could not generally achieve enough in an eventual settlement to make the strike worthwhile in monetary terms (A. 470). His study and classification of strikes by the issues that caused them led him to recognize that it is the nature of the issue that is crucial to the strike's length (A. 429-431).* Objective data, such as evidence on strike duration and wage rates, do not support the opinions quoted by Telco (A. 449).** He concluded, based on the evidence he has seen, that the payment of unemployment benefits after an eight week waiting period will be one factor among many (A. 465) and has no effect on the resolution of strikes (A. 432).

Petitioners presented no data to show that settlements in New York are higher than elsewhere. Respondents' data were analyzed by Dr. Kuhn, who testified that the wage trend in New York State over a substantial period of time was lower than the average for other States (A. 425-427). His industry analysis of all the available data covered 9.52% of the industries in which strikes of over eight weeks actually occurred in New York, Rhode Island, and other States (Defs. Ex. 122A, A. 295-296). Rhode Island also has "a clearly lower wage level for 'average gross hourly earnings'" than the other industrial States in the region (Pls. Ex. 317, p. 12).

In summary, the data on behavior—how long do employees in fact strike, what settlement levels are in fact achieved—show that New York's law has no significant impact on the outcome of collective bargaining.

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* The same approach has been utilized by Dr. Derek Bok, President of Harvard University, and Professor John Dunlop (A. 429-430).

** Dr. Kuhn noted that since the publication of his last book, computer technology had made it possible to develop more accurate statistics and to estimate the weight of various factors in collective bargaining (Tr. 1225-1226).



### 4. Newspaper Clippings, Tapes, and Other Statements of Opinion

Petitioners submitted at trial an assortment of newspaper clippings, letters, and taped messages which they offered as views on unemployment insurance by union representatives or newspaper writers. Even though they were selected by petitioners because of their contents rather than being an objectively developed and random scientific sample,* most of these exhibits were merely administrative advice to union members. As Dr. Mason Haire, professor of psychology and organization behavior in the School of Management of the Massachusetts Institute of Technology (MIT) concluded and reiterated on cross-examination, the great bulk of the material was not an exhortation to "do it, so that the strike will work" but "an administrative service to make sure that the things that are available were known to be available . . ." (A. 379-380, 390-391).

Petitioners' selection of quotes inflates the importance of the topic to the union speakers, who in fact mentioned unemployment insurance in only 3% of the telephone tapes even though they were then in the midst of a bitter strike. As conceded by Telco, Appendix A, p. 2, Pre-trial Order, there were approximately 2,200 such taped telephone messages recorded by CWA locals during the Telco strike alone, of which 142 were introduced by Telco. Of those introduced, approximately 68 dealt with unemployment insurance, and most merely illustrate the point made by Dr. Haire.

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* Petitioners also quote from and cite exhibits (for example, J. Curtis Counts' statements, p. 12) without advising this Court that these exhibits were not admitted in the District Court for their truth, or as expert opinion, but only for the "limited purpose" of showing that the statements were made (Tr. 235-237). Pls. Exhs. 366, 236.

An opinion survey presented by petitioners resulted in contacting only eight people who had ever been on strike (A. 356-357, Tr. 416), and their answers were not tabulated separately for purpose of comparison. Dr. Haire remained unconvinced after reading the survey that a public opinion poll that votes on whether unemployment insurance prolongs strikes is the proper method of arriving at the truth on that question (Tr. 610-611). "If I were charged somehow with determining the appropriateness of the New York State UI Law, I would certainly want to study the behavior rather than the opinions" (Tr. 603).*

## Summary of Argument

Since the National Labor Relations Act contains no provision prohibiting or even referring to unemployment insurance programs such as New York's, the inquiry must turn to other indicia of congressional intent. The purpose of Congress is "the ultimate touchstone". *Malone* v. *White Motor Corp.*, —— U.S. ——, 55 L.Ed. 2d 443, 450 (1978).

The question of eligibility for unemployment benefits was addressed in Title IX of the Social Security Act. This law was passed within five weeks of the National Labor Relations Act by the same Congress sitting at the same session. It created a comprehensive joint federal-state program, and

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* Examination of actual data is crucial. For example, petitioners claim (p. 13) that unemployment benefits influenced a national strike against General Electric. This runs counter to the votes cast by the International Union of Electrical Workers locals on whether to accept GE's contract offer. Two New York locals voted "yes" on the contract and 3 locals voted "no". On the other hand, in North Carolina, Florida, Missouri and Minnesota, where unemployment benefits were not available to the strikers, the majority voted "no" on the contract. Moreover, in Rhode Island, where strikers may qualify for benefits, both locals chose to ratify the contract and return to work. Defs. Exs. 74 and 75. Thus, the data on voting behavior refutes the opinion of the quoted union spokesman and petitioners' contentions.



established certain uniform national standards governing benefit payments by the States during strikes.

Although Congress considered the question of whether workers involved in an industrial controversy should be eligible for unemployment compensation, it refused to adopt any prohibition against any such payments. "Except for a few [necessary] standards the States are left free to set up any unemployment compensation system they wish, without dictation from Washington." S. Rep. No. 628, 74th Cong. 1st Sess. 13 (1935). Congress was aware of New York's enactment, which predates the National Labor Relations Act and the Social Security Act, and has remained substantially unchanged for more than forty years.

In the field of labor relations, this Court has defined two categories of cases to which the principle of preemption applies. The first concerns the "primary jurisdiction" of the National Labor Relations Board and involves activities arguably within Sections 7 and 8 of the National Labor Relations Act. The second includes cases which focus on the question of whether Congress intended that the conduct involved be unregulated. *Lodge 76, IAM* v. *Wisconsin Employment Rel. Comm'n.*, 427 U.S. 132, 138-140 (1976). However, *Malone* v. *White Motor Corp., supra,* reaffirms that preemption is a matter of congressional purpose, and teaches that the decision not to preempt is particularly evident where Congress itself has invited the States to act. The Social Security Act's elaborate and carefully constructed system of incentives is perhaps the classic example of this type of cooperative federalism.

Because the incentives created by Congress to induce the States to take part in the joint endeavor were so pervasive, the Social Security Act was challenged as usurping State powers. *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 593 (1937). This Court, which discussed New York's statute as well as those of four other States (at pp. 587-588, 593-594), rejected this challenge on the grounds that "a wide range

of judgment is given to the several states as to the particular type of statute to be spread upon their books." (301 U.S. at 593).

Efforts to create a legislative bar against striker benefits continued after the passage of the Social Security Act. President Nixon sought to introduce legislation in the 91st Congress which would have required the States to cease granting such benefits. This recommendation was rejected after testimony on the floor of Congress stating that: "We have tried to keep from prohibiting the States from doing the things the States believe are in the best interests of their people." 115 Cong. Rec. 34106 (1969).

Petitioners' preemption argument must fail for an additional reason. The legislative history of the National Labor Relations Act and of each federal enactment governing the payment of various forms of public assistance to striking employees demonstrates that Congress does not regard such payments as incompatible with free collective bargaining. In 1947, for example, the House enacted amendments to the National Labor Relations Act which provided that strikers who received unemployment benefits would thereby forfeit their status and protection under the Act.

The House Minority Report pointed out that the bill "apparently intends to discourage States from paying unemployment compensation to strikers . . . Under the Social Security Act, however, the determination of these matters was advisedly left to the States." NLRB Legislative History of the Labor Management Relations Act, 1947, p. 359. After a House-Senate Conference, the Senate version which did not contain this exclusion was accepted by the Conference Committee and ultimately the Congress.

Further evidence that Congress does not subscribe to petitioners' definition of neutrality in labor-management relations may be found in the Railway Labor Act which, as this Court has repeatedly recognized, protects and promotes collective bargaining. *California* v. *Taylor*, 353 U.S. 553, 559 (1957). Unemployment compensation for railway workers is fully financed by employers and such benefits have been mandated by Congress since the 1930's. 45 U.S.C. §§ 351-367.



This policy of granting public benefits to strikers is also found in the Food Stamp Act of 1964 (7 U.S.C. § 2001, *et seq.*). Congress has repeatedly refused to amend the Act to exclude strikers. In 1971 Congress directed the Secretary of Agriculture to establish "uniform national standards for eligibility" and specifically exempted strikers from disqualification (7 U.S.C. § 2014[c]) since Congress did not want "to take sides in labor disputes." H.R. Rep. No. 1402, 91st Cong. 2nd Sess. (1970), 1970 U.S. Code Cong. & Admin. News, pp. 6025, 6035.

The study of explicit committee reports, floor debates, pertinent statutory provisions and recent congressional amendments establishes that Congress determined either to provide benefits to strikers or to leave such decisions to the States. As this Court has held:

> "[S]tudy of the various provisions cited shows that when Congress wished to *impose* or *forbid* a condition for compensation, it was able to do so in explicit terms." *Ohio Bureau of Unemployment Services* v. *Hodory*, 431 U.S. 471, 488 (1977). (Emphasis added).

Finally, respondents show that petitioners' request for a refund of unemployment insurance taxes is barred by the Eleventh Amendment because New York's Unemployment Insurance Fund is in no way autonomous from the State, and is composed of tax revenues administered by State officials and defined as State funds by the Legislature and the courts.

## ARGUMENT

### Introduction

Petitioners contend that the National Labor Relations Act forbids the States to provide unemployment benefits to individuals who are on strike against an employer subject to that Act, on the grounds that it assertedly conflicts with "the national policy promoting collective bargaining free from government interference" (Brief, p. 20). The identical "national policy" was invoked by the employer in *Malone* v. *White Motor Corp.*, —— U.S. ——, 55 L. Ed. 2d 443 (1978), in contending that the NLRA preempted the Minnesota Private Pension Benefit Protection Act insofar as it imposed substantially greater obligations to provide pensions than the employer had undertaken in its collective bargaining agreement. In rejecting the preemption claim, this Court held (55 L. Ed. 2d at 450):

> ". . . [W]hether the Minnesota statute is invalid under the Supremacy Clause depends on the intent of Congress. 'The purpose of Congress is the ultimate touchstone.' *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103 (1963). . . ."

In ascertaining that intent, it was first determined that the National Labor Relations Act* did not expressly bar the States from regulating collective bargaining pension plans (55 L. Ed. 2d at 451). Next, in determining whether preemption should be implied, this Court examined not only the NLRA but also § 10 of the Welfare Pension Plan and Disclosure Act of 1958. The latter statute was held to be "a far more reliable indicium of congressional intent

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* 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 *et seq.* (hereinafter, "NLRA").



with respect to state authority to regulate pension plans" (55 L. Ed. 2d at 451). The body of the opinion was devoted to an examination of the language and legislative history of the 1958 Disclosure Act which, in the majority's view, "clearly anticipated a broad regulatory role for the states" (55 L. Ed. 2d at 455). "In the light of this history," this Court ruled, "we cannot hold that the Pension Act is nevertheless implicitly pre-empted by the collective-bargaining provisions of the NLRA." (*Id.*).

The case at bar presents a precisely parallel problem of determining the "intent of Congress". The NLRA policy which petitioners invoke is, as we have noted, the same as that urged unsuccessfully by the employer in *White Motor*. That policy preempts much State regulation of the countervailing forces in a strike or lockout, even as it preempts much regulation of the terms agreed upon in collective bargaining. The cases cited by petitioners, which were also those relied upon by the employer in *White Motor*, establish no more than this generality. Since the NLRA does not expressly prohibit the States from paying unemployment benefits to strikers, the inquiry must turn to other indicia of congressional intent.

Even as Congress addressed the question of pension regulation in the 1958 Disclosure Act, so it addressed the question of eligibility for unemployment benefits in Title IX of the Social Security Act. Indeed, while a very few States, including New York, adopted unemployment compensation legislation before Congress acted, the unemployment compensation system which presently exists is generally financed under the mechanism established by federal law, particularly the provisions for federal tax credits and federal funding of state administrative costs.

Thus, we must look to the Social Security Act to determine whether, and to what extent, Congress intended to

preclude the States from exercising their own judgment in establishing eligibility requirements for unemployment benefits. We undertake that examination in Point I of this brief, where it is shown that, as the Court of Appeals correctly concluded, Congress left the States broad freedom to establish eligibility requirements and specifically left them free to implement their own views as to whether strikers should or should not obtain benefits, and if so, under what conditions. In Point II of the brief we demonstrate that the petitioners' preemption argument is erroneous for the additional reason that Congress has consistently regarded the payment of unemployment compensation and other forms of public benefits to strikers as compatible with free collective bargaining.



## I. WHERE CONGRESS HAS ESTABLISHED A FEDERAL-STATE PROGRAM AUTHORIZING THE STATE TO LEGISLATE, THE PREEMPTION DOCTRINE IS INAPPLICABLE.

### A. The Social Security Act.

#### (1) The 1935 Passage of the Act.

The Social Security Act, which was passed within five weeks of the NLRA, launched a significant joint federal-state program. It provided a tax on employers in States which did not pass unemployment compensation laws,* and therefore all the States enacted such statutes. Congress established certain mandatory standards governing payment of unemployment benefits during strikes but determined to authorize—without requiring—the granting of unemployment benefits to strikers.**

The legislative history of the relevant provisions, formerly part of the Social Security Act*** and currently titled the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. §§ 3301-3309, is extremely revealing. It refutes petitioners' assertion (p. 46) that "Congress did not anticipate that unemployment compensation programs would be ex-

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* 26 U.S.C. § 3301, § 3304. Yearly, the Secretary of Labor reviews, authorizes and certifies that each State plan complies with the mandate of § 3304. He has objected to some New York provisions, but not the section at issue herein (Tr. 766-768).

** This authorization is as much a part of the federal labor scheme as is the NLRA's permission to resort to economic weapons. Petitioners' contention that the field has been preempted by the National Labor Relations Act (p. 20) assumes that Congress failed to understand and provide for the other areas which touch upon labor-management matters. Congressional intentions regarding labor relations are expressed in various statutes, among them the Social Security Act, the Railroad Unemployment Insurance Act, and the Food Stamp Act (See pp. 43-48, *infra*). Cf. *Malone* v. *White Motor Corp., supra.*

*** Pub. L. No. 74-271, §§ 901-910, 49 Stat. 639-45.

tended by the states to strikers." In 1934, when Congress had the matter of unemployment compensation under consideration, its study included the question of whether workers engaged in an industrial controversy should be eligible for unemployment compensation. Mr. Edmund Witte, Executive Director of the Presidents' Committee on Economic Security, which had been created by Executive Order 6757 (1934),* recommended the following on behalf of the Advisory Council:

> "B. Types of unemployment not benefited. (1) Unemployment of persons directly engaged in trade disputes for the duration of the dispute.**

Dr. Abraham Epstein, representing the American Association for Social Security and Mr. Noel Sargent, representing the National Association of Manufacturers, made similar suggestions.***

These recommendations were rejected. The Senate Finance Committee Report on the Social Security Act of 1935, in explaining the legislative choices involved, stated unequivocally:

> "Except for a few [necessary] standards the States are left free to set up any unemployment compensation system they wish, without dictation from Washington."****

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* The key role of the President's Committee was recognized in *California Human Resources Dept.* v. *Java,* 402 U.S. 121, 130 (1971), where this Court stated that "[t]he Social Security Act received its impetus from the Report of the Committee on Economic Security . . ."

** Hearings on S. 1130, Committee on Finance, U.S. Senate, 74th Cong., 1st Sess. Report of the Advisory Council to the Committee on Economic Security (Dec. 18, 1934), at 228 (1935), hereinafter "Senate Hearings."

*** *Id.* at 472, 959.

**** S. Rep. 628, 74th Cong. 1st Sess. 13 (1935); see also *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 593 (1937).



These standards provided:

> "(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:
>
> (A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;
>
> (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
>
> (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.*

As indicated by Senator Wagner, the sponsor of the Act and the first witness in hearings before the Senate Finance Committee** "[p]ractically no restrictions" were placed on the types of laws which the States could enact. This reflected congressional recognition that because "our own extent of territory is so great, and our enterprises so dissimilar in far-flung sections," the States should "experiment in 48 separate laboratories."*** See *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937), quoted at p. 32, *infra.*

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* Section 903(a)(5), currently 26 U.S.C. § 3304(a)(5). *Amicus* Rochester Telephone Co. seeks (pp. 19-20) to discount this provision on the theory that it applies only to those who are "entitled" to benefits and not those who should be "denied" benefits This Court came to the opposite conclusion about the same provision in *Ohio Bureau of Unemployment Compensation* v. *Hodory,* 431 U.S. 471, 488, n. 16 (1977), where this section was used to illustrate the point that Congress is able to forbid or impose conditions for receipt of unemployment insurance if it determines to do so.

** Hearings before the Committee on Finance, U.S. Senate, 74th Cong., 1st Sess. on S. 1130 (January 22 to February 20, 1935), at page 5.

*** *Id.* at page 3.

While this general policy is controlling, it is noteworthy that the New York statute predates the enactment of the NLRA and the Social Security Act, and that Congress was aware of the State's provision (Pet. 11a-12a). From the outset, the law provided a seven-week suspension period* during which no one who was unemployed as a result of an industrial controversy would receive unemployment benefits; after the expiration of this period, benefit rights could be accumulated, subject to the requirement of availability and capability to work and other eligibility prerequisites.

Faced with the fact that the challenged provision has been substantially unchanged since its inception, petitioners argue (pp. 45-50) that 1) experience rating was not "introduced" until years after the NLRA was enacted 2) benefit rates were lower in 1935 and that 3) benefit periods have been extended since that time. This argument, even if historically accurate, would only show that New York exercised the freedom which Congress gave it, rather than that the State exceeded that freedom. However, it is not accurate.

"Experience rating"—which relates the employer's tax rate to the number of his workers currently unemployed—was already listed on the face of New York's enactment as under study, with a further report to the Legislature on its practicability required no later than March 1, 1939.** Indeed, Congress created tax incentives for State adoption of experience rating provisions (which had already been enacted by Wisconsin).***

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* The waiting period applicable to all claimants, and which is added on to the suspension period for strikers, was shortened by two weeks in June, 1942. 1942 N.Y. Laws, Chap. 640, § 504.

** 1935 N.Y. Laws, Chap. 468, § 518(4).

*** See Senate Report 628, to accompany H.R. 7260, 74th Cong. 1st Sess. (1935), p. 3; §§ 909, 910, Social Securiy Act, August 14, 1935, 74th Cong. 1st Sess., Ch. 531. W.S.A. § 108.18.



The 1935 Congress would also have been aware that some strikes would be of extended duration; 4.9% of the nation's strikes in that year exceeded 3 months, and these disputes involved 29.0% of the total man-days lost as a result of strikes.* In 1928, 8.2% of strikes had been at least 3 months in duration.**

In citing the changed benefit rates, petitioners have apparently forgotten the factor known as inflation. The buying power of $15.00 in 1935 was equivalent to $43.55 in 1971.***

In short, the 1935 Congress had the relevant facts. There is no basis for presuming that it did not understand them.

**(2) The District of Columbia Law and the Social Security Board Draft Bills.**

Petitioners' citation (p. 49) of the District of Columbia's law, in which Congress acting as a local legislature ex-

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* United States Department of Labor, Bureau of Labor Statistics, Bulletin 651, "Strikes in the United States." 1880-1936 (August 1937), pp. 52-53.

** *Ibid.*

*** Consumer Price Index for Urban Wage Earners & Clerical Workers (U.S. City Average, all items index) Department of Labor, Bureau of Labor Statistics. See also Registered Unemployment, Employment & Average Earnings of Workers covered by New York State Unemployment Insurance Law, 1939-1969; Table D, p. 27. The alterations in benefit periods have resulted from federal enactments providing for extended benefits (50% federally financed) and supplemental benefits (100% federally financed). (Tr. 772-773). No agency of the federal government has attempted to cease the payment of supplemental benefits to employees who are on strike (Tr. 774-775). § 601 of the New York Unemployment Insurance Law provides for extended benefits upon a determination of the United States Secretary of Labor or of the Industrial Commissioner in accordance with regulations of the United States Secretary of Labor. See Regulations of the Secretary of Labor to Implement the Federal-State Extended Unemployment Compensation Act of 1970, §§ 615.13, 615.14(b).

cluded strikers from receiving benefits while a labor dispute is in "active progress",* does not aid Telco's position. Although Congress clearly had the possibility of striker eligibility in mind when it passed the D.C. bill and the Social Security Act within the same month, the national legislation contained no restriction on such eligibility. This exemplifies a fundamental point herein. Had Congress wished to assume the role of a State legislature, it might have enacted provisions different from those chosen by New York and other States. But it did not assume this role. Instead, it left the choice of programs to the States for determination.**

Nor are the draft bills of the advisory Social Security Board evidence of federal preemption. Petitioners imply that these bills were recommendations to the States as to which approach the Board (and Congress) wished them to utilize. However, on the face of the bills cited (petitioners' brief, p. 48) is a statement by the Board that the provisions set out are

> ". . . merely suggestive and are intended to present the various alternatives that may be considered in the drafting of state unemployment compensation acts. Therefore, they cannot properly be termed 'model' bills or even recommended bills. This is in keeping with the policy of the Social Security Board of recognizing that it is the final responsibility and *the right of each state to determine for itself just what type of legislation it desires and how it shall be drafted.*"*** (emphasis added)

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* Act of August 28, 1935, ch. 794 S10(a), 49 Stat. 950.

** *Cf.* the 1969 testimony of the Chairman of the Ways and Means Committee concerning the New York statute, stating that "I would not vote for it," but that the State has a right to make its own judgment. 115 CONG. REC. 34106.

*** Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types, prepared by the Social Security Board, Washington, D.C. January 1936.



Indeed, in *Ohio Bureau of Unemployment Services* v. *Hodory* 431 U.S. 471, 485 (1977), this Court declared, after citing the above-quoted cover page, that it would be "most reluctant to read implications of the draft bills into the Social Security Act."

Moreover, petitioners erroneously state (p. 48) that the draft bills "expressly denied benefits to strikers" and that "The striker disqualification contained in the model bill was followed in virtually all of the states." To the contrary, the cited bills permitted strikers to receive benefits where there was no substantial curtailment of the employer's business ("stoppage of work"). *Cf. Kimbell* v. *New Mexico Employment Security Commission,* 429 U.S. 804 (1976). Although three States whose laws predated the Social Security Act had precluded strikers from eligibility,* the draft bills did not adopt these formulations.

*Amicus* Dow Chemical Co. *et al.* contends (p. 26) that draft bills were utilizing the term "work stoppage" as it was understood under the British system, and that under that system strikers were not paid benefits during industrial controversies unless they were replaced. In fact, this was not the British system. See *Ahne* v. *Department of Labor and Industrial Relations,* 53 H. 185, 188, 489 P. 2d 1397 (1971):

> ". . . The British courts, however, quickly interpreted the phrase 'stoppage of work' to refer not to the cessation of the workmen's labor, but to a stoppage of work carried on in the factory . . . Ministry of Labor, Analytical Guide Unemployment Insurance Code 7,

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* Laws of N.H. January Session 1935, Ch. 99, An Act Providing for the Establishment and Administration of Unemployment Compensatiton P.L. 179-A, § 24; Laws of Utah 1935 Twenty-First Regular Session. Unemployment Reserve Law, Ch. 38, § 8(a)(3); Laws of Washington Twenty-Fourth Regular Session, 1935, Ch. 145 Unemployment Compensation Act § 7(4).

Part III S43 (1939 ed.); British Unemployment 1408/1927, BU-495 (1927); British Unemployment 609, BU-493 (1921)."

This is also made clear in the source quoted by *amicus* Dow (p. 28),* which states:

> "It is not a disqualification that employment has been lost through a trade dispute unless the dispute involves a stoppage of work, and a 'stoppage of work' refers primarily not to a cessation of the workman's labour, but to a stoppage of the work carried on in the . . . premises at which the workman is employed."**

The portion quoted by *amicus* merely points out that the replacement of employees was looked to as evidence that no stoppage of work had occurred.*** Such evidence would not be necessary in the case of an automated industry such as a telephone company.

Contrary to *amicus'* contention (p. 26), the Telco strikers would not have been disqualified under the "stoppage of work" bills. It is ironic that the instant case was brought in New York by plaintiffs whose striking employees would have been paid unemployment benefits in the majority of States (Defs. Ex. 1, A. 248-251), for example those utilizing the option approved by this Court in *Kimbell, supra.* And in these other jurisdictions, there is no special suspension period for strikers—they are paid from the outset.

Petitioners' final argument as to the 1935 Social Security Act provisions (p. 47) is that compensation of involuntary unemployment was the sole congressional purpose. Such an

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* Hughes, Marsile, J., "Principles Underlying Labor-Dispute Disqualification" (Social Security Administration, July 1946).

** *Id.* at p. 22.

*** *Id.* at pp. 25-26.



approach had been recommended by Edmund Witte, who favored the inclusion of the following provision:*

> "(3) Voluntary quit without reasonable cause may be uncompensated entirely or for such period as the plan may designate."

Congress did not adopt this provision. It may be noted that a voluntary-involuntary differentiation is not the decisive factor in the various unemployment statutes. Employees who voluntarily leave their employment for good cause are eligible in all States. Pursuant to federal requirements (26 U.S.C. § 3304[a][5]), the unemployed worker may not be denied benefits if he chooses to refuse employment where a labor dispute is in existence or where the wages or conditions offered are less than those prevailing in the same local industries.

At the same time, he may be *denied* compensation even if his unemployment is entirely involuntary. *Ohio Bureau of Unemployment Services, et al.* v. *Hodory, supra.* Statutes which do not compensate locked-out employees are not the only example of such denials. Some States do not give benefits to those who are members of a "grade or class" of workers directly interested or participating in a labor dispute. If the plant or establishment closes down as a result of this dispute, an employee who is entirely opposed to the strike will receive no compensation if he is in the same class as those participating.

**(3) Subsequent Legislative Developments.**

Efforts to create a legislative bar against striker benefits continued after the passage of the Social Security Act. President Nixon sought to introduce legislation in the 91st Congress which would have amended FUTA to include a "requirement that [the] practice of paying unemployment

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* Senate Hearings, *supra*, at 228.

insurance benefits to workers directly engaged in a strike be discontinued.'"*

This recommendation was rejected after testimony on the floor of Congress. The Congressional intent was unequivocally stated:

> "We have tried to keep from prohibiting the States from doing the things the States believe are in the best interest of their people. . . . For example, there are . . . States . . . which will pay unemployment benefits when employees are on strike . . . [I]f the State wants to do it we believe they ought to be given latitude to enable them to write the program they want."**

**(4) The Preemption Doctrine.**

Petitioners' invocation of the preemption doctrine must fail. In the field of labor relations, this Court has defined two categories of cases in which it applies the principle of preemption. The first includes cases concerned with the "primary jurisdiction of the Board," involving activities arguably "within the compass" of §§7 and 8 of the NLRA.*** The second encompasses cases which focus upon

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* Message from the President, 91st Cong., 1st Session, July 8, 1969.

** Statement of Rep. Wilbur Mills, Chairman of the House Ways & Means Committee, 115 Cong. Rec. 34106 (1969); H.R. Rep. No. 612, 91st Cong., 1st. Sess. (1969)

*** See e.g. *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967), erroneously described by petitioners (p. 28) as "stand-[ing] four square against" the decision below, apparently because it contains general statements that States may not pass any unemployment compensation law which "frustrates federal legislation." In *Nash*, Florida refused to pay unemployment compensation to a person who had filed an unfair labor practice charge against a former employer. Section 8(a)(4) of the NLRA *explicitly* provides that it is an unfair labor practice for an employer to discriminate against an employee because he or she has filed charges. This Court held that the statutory rule in the NLRA prohibiting punitive action by employers and unions against anyone making charges also applied to the States.



the question of whether Congress intended that the *conduct involved* be unregulated and left "to be controlled by the free play of economic forces," *Lodge 76, IAM* v. *Wisconsin Employment Rel. Comm'n.*, 427 U.S. 132, 138-140 (1976).*

But *Malone* v. *White Motor Corp., supra,* reaffirms that preemption is a matter of congressional purpose, and teaches that the decision not to preempt is particularly evident where Congress itself has invited the States to act. As we have shown, Congress made clear in the Social Security Act its intention that the States develop an unemployment insurance program and determine, subject to narrow restrictions set out in the Act, who should be eligible for benefits and under what terms.

Petitioners seek to distinguish *White Motor Corp.* (p. 34) by contending that there "Congress had affirmatively and clearly indicated"—presumably in the disclaimer provision** of the Welfare and Pension Plans Disclosure Act

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* In *Lodge 76, IAM* the State Commission had ruled that the refusal of employees to work overtime during the negotiation of a new contract was *an unfair labor practice* under state law. This Court found the State's action improper because it had entered into "the substantive aspects of the bargaining process," sought to pick and choose which economic devices of labor and management would be "branded as unlawful," and to "police the use" by employees and employers of peaceful methods of applying economic pressure (427 U.S. at 149, 155). New York's statute by contrast does not regulate the conduct of the parties to an industrial controversy, and provides no power to "police" them. New York refuses to dictate any substantive terms in labor contracts, and does not "brand as unlawful" any particular economic tools labor and management may use in their industrial disputes.

** § 10(b) of the Act provides:

> "The provisions of this Act, except subsection (a) of this section and any action taken thereunder, shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law."

("WPPDA")—that the States could "regulate pension plans." In actuality, the thrust of the disclaimer provision is negative—it does no more than indicate that Congress expected that the States would pass regulations in this area and had no objection.

If there is a meaningful difference, the Social Security Act more clearly encouraged the States to act than did the WPPDA, for in the Social Security Act, Congress provided for an elaborate system of incentives, including a 90% tax credit and federal funding for administration of the unemployment insurance program—all designed to induce the States to enter the field. This is more than permission to act. It is authorization engendered by an urgent congressional program requiring federal-state cooperation. The New York statute was authorized by the Social Security Act—by a Congress already aware of its existence—as part of this cooperative endeavor.

Because the incentives created by Congress to persuade the States to take part in the joint endeavor were so pervasive, the Social Security Act was challenged as usurping State powers. *Steward Machine Co.* v. *Davis, supra.* This Court, which discussed New York's statute as well as those of four other States (at pp. 587-588, 593-594), rejected this challenge on the grounds that "a wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books." (301 U.S. at 593).

**B. The New York Statute.**

The provision at issue, Section 592.1 of the New York Unemployment Insurance Law, prohibits the payment of unemployment benefits for the initial seven weeks after the commencement of a strike, lockout, or other industrial controversy. It permits the accumulation of such benefit rights after this suspension period, subject to the requirement of availability and capability to work and other eligibility prerequisites. § 590.9 provides in addition a waiting period



which is equivalent to one week pursuant to the definition in § 523, applicable to all claimants.

This section was drafted prior to the enactment of the NLRA by a tri-partite Committee composed of representatives of employer and labor groups as well as members of the public. The Committee concluded (Tr. 496, 498, 510-511) that it is often impossible to distinguish between strikes and lockouts.* If a company with rising profits offers its employees $2.00 an hour less under a proposed new contract than they were receiving under the prior contract and they refuse to work for this wage, is this a strike and therefore the fault of the worker? If employees reduce their productivity substantially and the employer refuses to continue his business operation, is this a lockout and therefore the fault of management? The possibility of such manipulation (Tr. 516-518) led the Committee to recognize that New York's statute should require no administrative adjudication as to the cause of the industrial dispute or the nature of the participants.**

Petitioners' analysis of the statute (pp. 30-31) is based on the misapprehension that strikers have been found to be unemployed through their own "fault"*** and that therefore payments to them subvert the purpose of the statute. However, a determination of "fault" is precisely what the Legislature did *not* authorize in industrial disputes.

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* Albert Belman, Director, Work Stoppage and Union Membership Projects, Bureau of Labor Statistics, United States Department of Labor, testified that often the information submitted by the parties to a labor dispute as to why the employees are not working is diametrically opposed (Tr. 679).

** There are States which make such distinctions. However, it is the opinion of unemployment insurance administrators from the various jurisdictions that New York's statute is operationally more effective (Tr. 533).

*** Another variation of this argument proffered by *amicus Dow Chemical Co.* (p. 10), is that a striker is "voluntarily" unemployed and should therefore be ineligible. This contention is answered *supra* at p. 29.

In interpreting the provision, the New York Court of Appeals has held:

> "Whether . . . [a] work stoppage was the fault of the employer or employee, was of no consequence in determining, first, that unemployment benefits were to be suspended during the early stages of the strike and, second, that they were to be paid thereafter if the workers remained idle." *Matter of Heitzenrater,* 19 N Y 2d at pp. 1, 7, —— N.Y.S. 2d —— (1966).*

See in accord, *Matter of Ferrara* (*Catherwood*), 10 N Y 2d 1, 8 (1961); *Matter of Burger* [*Corsi*], 277 App. Div. 234, 236 (3rd Dept. [1950]), affd. 303 N.Y. 654 (1951); *Lascaris* v. *Wyman,* 31 N Y 2d 386 (1972). Indeed, § 593 of the New York Unemployment Insurance Law provides that persons unemployed because of a "strike, lockout or other industrial controversy" are deemed to have been separated from their employment for good cause." Nevertheless, such employees are subject to a seven week suspension period beyond the normal one week waiting period prior to eligibility for benefits.

The adoption of this particular plan of insurance benefits for strikers was viewed as a compromise:

> "The industrial controversy provision, reflecting 'the principle of governmental neutrality' (*Matter of Ferrara* [*Catherwood*] 10 N Y 2d 1, 8) represents a compromise of sorts. Faced with the choice of providing either (1) that benefits be awarded to workers, made idle by a strike or any other industrial controversy, from the day after they lost their employment or (2) that benefits be withheld altogether throughout the

* However, no benefits may be paid to strikers even after eight weeks, when [t]he fact and legal issues . . . are clear and uncomplicated, and . . . the conduct engaged in has been expressly declared 'unlawful' by the Legislature." *Matter of Rodriguez* (Presbyt. Hospital-Levine), 32 N Y 2d 577, 582-583 (1973).



> period of their unemployment, the Legislature took a middle course. It enacted subdivision 1 of section 592 to cover *all* cases of unemployment resulting from strikes and other industrial controversies." *Matter of Heitzenrater, supra,* 19 N Y 2d at p. 7.

As is the case with many compromises, the provision has been attacked from opposite directions. A constitutional challenge to New York's eight week suspension and waiting period by employees who were involuntarily laid off when their employer ceased operations because of a strike by a union of which they were not members, was rejected in *Drassenower* v. *Levine,* 48 A D 2d 957 (3rd Dept., 1975), *appeal dismissed* 38 N Y 2d 771 (1975), *cert. den.* 431 U.S. 953 (1977).

Petitioners urge (p. 18) that total denial of unemployment benefits from the outset, regardless of the circumstances, would be true "neutrality."* However, New York's legislative determination directly parallels that of Congress in refusing to disqualify strikers for food stamps. As will be shown *infra,* the reason for this federal provision was the congressional determination not to "take sides in labor disputes." H.R. Rep. No. 1402, 91st Cong., 2nd Sess. (1970), 1970 U.S. Code Cong. & Admin. News pp. 6025, 6035.**

* In the course of this argument, they imply that Unemployment Insurance Director Harold Kasper agreed with their view. In fact, he steadfastly rejected it (A. 405), pointing out that "after eight weeks positions have hardened and the amount of benefits that would be paid won't settle the strike either way."

** Indeed, the principle of neutrality in the field of labor relations has never been understood to require that the States refrain from passage of any affirmative labor legislation. States have, for example, enacted broad programs to effectuate minimum wage laws, workmen's compensation, and safety and hours laws. *Malone* v. *White Motor Corp., supra.*

After the expiration of eight weeks, the unemployment of a worker who is locked out or on strike is clearly related to the state of the job market. It may be noted that strikers are required to seek and accept temporary jobs (Tr. 764). Special scrutiny is given to those who were employed in demand occupations, such as stenographers and bookkeepers (Tr. 762). A telephone lineman who had other training would be required to accept work within that field (Tr. 765). Union members are aware that this provision will be enforced. See Pls. Ex. 96, a CWA tape directed to members during the TELCO strike: "Regarding the blue slips from the unemployment office . . . You will have to . . . look for a job. Make a personal contact and leave your name. They will be checking the places you looked to see if you did make a personal appearance. You would be required to accept a job offer in your field or related field and within your salary range. This is a required law under the unemployment service."

Petitioners also object to the New York Unemployment Insurance Law on the grounds that it is "employer-financed" (p. 19). All 50 states have employer-financed systems; only three of these collect employee contributions in addition.** Moreover, as was made clear in *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 514 (1936), which held in the context of a Fourteenth Amendment challenge that the States have broad scope to fashion their own unemployment insurance provisions:

> "This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he

** Comparison of State Unemployment Insurance Laws, United States Department of Labor, Employment and Training Administration, January, 1978, Ch. 200, § 205, p. 2-1.



> can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him." (301 U.S. at 523).*

Obviously, Congress knew when it inaugurated the social security program that employers would bear the cost of it.

New York's provision of benefits to strikers after eight weeks is grounded in part on "concern for the social and economic well-being of citizens—an interest," as the court below observed (Pet. 11a-12a, n. 5) "which lies well within its legislative powers." See also *Matter of Ferrara (Catherwood) supra.* In *Grinnell* v. *Hackett,* 475 F. 2d 449, 460 (1st Cir. 1973), cert. den. 414 U.S. 858 (1973) the court noted that "the payment of unemployment benefits represents an attempt to assist the striker and his family in meeting obligations previously undertaken."

Another significant purpose of the statute is to cushion the economy. *Steward Machine Co.* v. *Davis, supra.* "This money is not saved. These are hot dollars, they are velocity dollars, they are spread out in the economy; they pay the butcher, baker—I used to say the candlestick maker, but now I say the electric company, and I include the New York Telephone Company." (Testimony of the Director of the Unemployment Insurance Division of New

* The argument that the New York statute violates due process of law because it "exacts contributions for the purpose of making cash payments to employees on strike without just cause" (Brief of petitioner No. 49, Oct. Term 1936, p. 66) was rejected in *W.H.H. Chamberlain* v. *Andrews,* 159 Misc. 124, 286 N.Y.S. 242 (Sup. Ct. Onondaga Cty.), modified, 271 N.Y. 1 (1936), affd. by an evenly divided court, 299 U.S. 515 (1936), reh. denied, 301 U.S. 714 (1937). This Court denied rehearing on the same day as it ruled in *Steward Machine Co.* v. *Davis, supra,* that the States had been given wide discretion by the Social Security Act to determine the particular kind of statute they wished to enact.

York's Labor Department, A. 401, Tr. 838).* See also the testimony of Secretary of Labor Perkins in support of the original Social Security Act, quoted in *Calif. Human Resources Dept.* v. *Java, supra,* 402 U.S. at 132-133.

**C. The Range of Statutory Options.**

The vast majority of the States have rejected the view that unemployment compensation must be withheld during industrial controversies, or should be paid only to employees who have been formally "locked out" by their employers.**

In many States, benefits are paid to employees in certain categories from the outset of a strike. The option chosen by New York is unique in *barring* payments during the first eight weeks of an industrial controversy, thus eliminating approximately 89% of strikes from the payment category completely.*** This is the percentage of strikes which are shorter than eight weeks.

This Court has already sustained the right of the States to adopt one of the possible approaches—the granting of benefits if the employer continues to operate during a strike. See *Kimbell, Inc.* v. *Unemployment Security Commission of New Mexico, supra.* A considerable range of statutory schemes have been established, of which New York's and New Mexico's represent two options. Adoption of petitioners' rationale, however, would require the federal courts to evaluate the laws not modelled on New Mexico's to determine which are "best."

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* The State's interest in maintaining this program is in itself a valid basis for rejecting petitioners' preemption claims. *Cf. Grinnell* v. *Hackett, supra.*

** See Defs. Ex. 1, prepared by the United States Department of Labor, summarizing all the statutes (A. 248-251).

*** Defs. Ex. 113-A.



The subjectivity of this exercise would be endless.* Should States be allowed to pay if the dispute is caused by a hazardous condition?** The employer's failure to conform to his own collective bargaining contract?*** An employer's violation of the labor law?**** Should employees receive benefits if they are not in the grade or class financing the dispute or not directly interested in it, or have been laid off from a *bona fide* subsequent job?*****

While the District Court herein found New York's statute more violative of "federal labor policy" than New Mexico's law (Pet. 51a-53a), the District Court in Hawaii determined after trial that Hawaii's provision (identical to New Mexico's law upheld in *Kimbell*) was intrusive because of features not present in New York's enactment:

> "By focusing on the *effect* of collective action by employees upon the employer's business operations when the parties are in the throes of a collective bargaining conflict, it impinges upon 'the very subject addressed by Congress in NLRA' and therefore is preempted, unless Congress has provided otherwise." Footnotes omitted). (Emphasis added).******

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* Testimony by nationally known experts concerning statistics directly countering petitioners' theories (see pp. 3-5, *supra*), was disregarded by the District Court, which accepted a "truism" about the payment of benefits (Pet. 28a, 38a).

** 26 Me. Rev. Stat. Ann. § 1193 (amended 1977).

*** E.g. W. Va. Code § 21A-6-3 (amended 1976); N.H. Rev. Stat. Ann. 282:4 (amended 1973).

**** E.g. Ariz. Rev. Stat. Ann. § 23-777 (amended 1952); Rev. Codes of Mont. § 87-106 (amended 1977).

***** Fla. Stat. Ann. § 443.06 (amended 1972); Nev. Rev. Stat. 612-395 (1955); Conn. Gen. Stat. Ann. §§ 31-236 (amended 1977), 31-236(a) (1969); Ann. Laws of Mass. C-151A § 25 (amended 1976); Mich. Comp. Laws Ann. § 421-29 (amended 1975).

****** *Hawaiian Tel. Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.*, 405 F. Supp. 275, 284 (D. Hawaii 1976), *appeals docketed* (9th Cir. Mar. 19 and May 12, 1976, Nos. 76-1584, 76-2056), *cert. den.* 46 U.S.L.W. 3600 (1978).

Such contradictions occur when courts are asked to make judgments which are essentially legislative in nature. Since Congress intended to authorize variations in State law as to the eligibility of strikers for benefits, the nature of that determination may not be altered by introducing a requirement that each variant be judicially approved.



## II. SINCE CONGRESS DOES NOT REGARD THE GRANTING OF UNEMPLOYMENT BENEFITS TO STRIKERS AS INCONSISTENT WITH FREE COLLECTIVE BARGAINING, IT HAS REJECTED A UNIFORM NATIONAL STANDARD WHICH WOULD BAR SUCH PAYMENTS.

The claim that the granting of unemployment benefits to strikers is incompatible with federal labor laws cannot be resolved by economic theories. It is a question of congressional intent. The unanimous decision of the Second Circuit contains a complete analysis of that intent. The legislative history of the National Labor Relations Act, and of each federal enactment governing the payment of various forms of public assistance to striking employees, demonstrates that the congressional view of neutrality differs sharply from that of petitioners. Commencing with the virtually simultaneous passage of the NLRA and the Social Security Act in 1935, Congress has consistently shown that it does not regard a uniform national standard which would bar striker eligibility for benefits as essential to the federal regulatory scheme.

### A. The National Labor Relations Act.

Contrary to petitioners' assertion (p. 46) that the attention of Congress was not on state unemployment insurance statutes at the time that it created the national labor policy, the NLRA did not spring forth from its own separate and unique Congress. The original National Labor Relations Act (Wagner Act) and legislation establishing a national unemployment insurance program (Title IX of the Social Security Act of 1935) were the products of the same Congress sitting at the same session.* The Wagner Act

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* As shown *supra*, the 1935 Congress spoke through the Social Security Act in establishing a number of restrictions governing payment of unemployment compensation during strikes, but left to the States the decision as to whether to pay benefits to strikers, and if so, under what circumstances.

was enacted on July 5, 1935, and the Social Security Act five weeks later, on August 14, 1935. In fact, Senator Wagner was a sponsor of both statutes.*

There have been persistent efforts to introduce into Congress the restrictions on the States which petitioners are now seeking from the judiciary. In 1947, for example, the House enacted amendments to the NLRA which provided that strikers who received unemployment benefits would thereby forfeit their status and protection as employees under the Act.** The House Minority Report,*** in discussing this provision stated:

> "2. Employee—Section 2(3) redefines the term 'employee.' Under the present act, strikers remain employees so long as the labor dispute is current; under this bill a striker ceases to be an employee if he has been 'replaced by a regular replacement, or has obtained other regular and substantially equivalent employment, or is receiving unemployment compensation from any State.' . . . *The bill apparently intends to discourage States from paying unemployment compensation to strikers by penalizing employees who accept unemployment compensation. Under the Social Security Act, however, the determination of these matters was advisedly left to the States.*" (Emphasis added).

After a House-Senate Conference, the Senate version which did not contain this exclusion was accepted by the Conference Committee and ultimately the Congress.****

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* 79 Cong. Rec. 9283 (1935).

** NLRB Legislative History of the Labor Management Relations Act, 1947 (hereinafter "1 NLRB Legislative History"), pp. 161, 303-4; H.R. 3020, 80th Cong., 1st Sess. (1947).

*** NLRB Legislative History, *supra*, p. 359.

**** H. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947), 1947 U.S. Cong. Service 1135, 1137-9.

*(footnote continued on following page)*



### B. The Railroad Unemployment Insurance Act.

Telco's thesis that Congress regards the payment of unemployment benefits to strikers as inconsistent with free collective bargaining collides with the fact that Congress has directly mandated both the right to strike and the payment of unemployment compensation to railroad workers. Specifically, the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-367, grants benefits to strikers unless the Railroad Retirement Board finds that the strike was commenced in violation of the Railway Labor Act or in violation of the established rules and practices of a *bona fide* labor organization of which the claimant was a member. (45 U.S.C. § 354 [a-2] [iii]).* The legislation was enacted despite the opposition of the railroads, whose representative urged that the railroad workers would be granted benefits more favorable than existed under most state laws.**

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*(footnote continued from preceding page)*

It is clear that the intent of Congress may be inferred from the history of the House and Senate bills and the reports relevant to them. See, e.g., *Malone* v. *White Motor Corp.* —— U.S. ——, 55 L.Ed. 443 (1978); *Ohio Bureau of Employment Services* v. *Hodory, supra; Labor Board* v. *Drivers Local Union*, 362 U.S. 274, 288-290 (1960), where the Court looked both to the Senate and House drafts and Conference Reports in determining the intent of Congress.

* New York similarly refuses unemployment benefits to employees engaged in strikes which are illegal under any New York statute. See *Matter of Rodriguez* (Presbyt. Hospital—Levine) *supra*, 32 N Y 2d at 582-583.

** Hearings before a Subcommittee, House Committee on Interstate and Foreign Commerces, 75th Cong., 3rd Sess. at p. 133 (1938).

In 1961, Congress passed the Temporary Extended Railroad Unemployment Insurance Benefits Act of 1961, 45 U.S.C. §§ 401-404. The purpose of this legislation was to grant additional unemployment payments on a temporary basis to unemployed railroadmen who had exhausted their right to benefits under the Railroad Unemployment Insurance Act between certain dates (Senate Report No. 72, U.S. Code Cong. and Admin. News, 1961, p. 1507). Strikers and those laid off are not distinguished in this provision.

Congress has recently amended the Railroad Unemployment Insurance Act.* 45 U.S.C. § 352(a) provides that an individual who is unemployed because of a strike is entitled to receive unemployment benefits following an initial seven *day* disqualification period. Section 352(a) of the federal act also provides a daily benefit rate equal to 60 percent of the employee's daily salary but *not less* than $25.00 per *day* for periods after June 30, 1976. Finally, 45 U.S.C. § 352(h)(1) provides for an extended benefit period.

This Court has repeatedly stated that the purpose of the Railway Labor Act ("RLA") is to foster free collective bargaining. See *California* v. *Taylor*, 353 U.S. 553, 559 (1957):

> "On numerous occasions, this Court has recognized that the Railway Labor Act protects and promotes collective bargaining. *Virginian R. Co.* v. *System Federation No. 40*, 300 U.S. 515, 548-549, 553; *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 300, 302; *Order of Railroad Telegraphers* v. *Railway Express Agency Inc.*, 321 U.S. 342, 346-347; *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192, 202; *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225, 233, 235."

*Amicus* Rochester Telephone Company contends (p. 25) that "Unemployment Insurance is not awarded on the basis of need and it offends the policy of neutrality by requiring the employer to subsidize the very people with whom it is supposed to be freely bargaining." Congress does not agree. Unemployment compensation for railway workers is financed wholly by employers,** and such benefits have been mandated for more than 40 years.

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* Aug. 9, 1975, Pub. L. No. 94-92, Title 1, § 1(c)-(e), 89 Stat. 461.

** 45 U.S.C. § 359(b).



The "true significance of the RLA here," in petitioners' view (p. 57) is that since Congress has mandated payments to strikers under the RLA, it must have intended to preclude them under the NLRA. Under this rationale, whatever is omitted from federal law is prohibited to the States—a proposition which turns both federalism and the Constitution on its head. It ignores what appears repeatedly in the legislative history of all the relevant statutes, as will be shown below--that Congress has determined either to *require* unemployment compensation during strikes, or to leave the choice to the States.

### C. The Food Stamp Act of 1964.

The Food Stamp Act of 1964 (7 U.S.C. § 2011, *et seq.*) is still another example of federal-state cooperation where benefits are made available to strikers. Several amendments to the original Act have been attempted which would have precluded an individual who is participating in a strike from receiving food stamps. All these attempts have failed.*

The States were originally left free to determine their own eligibility requirements subject to the Secretary of Agriculture's approval. In 1971, Congress amended the section of the statute under which the States were allowed to set eligibility standards for the Food Stamp Act and required the Secretary of Agriculture to create "uniform national standards of eligibility." 7 U.S.C. § 2014(b). Although it specifically required a national standard disqualifying households with able-bodied adults who refuse to register or accept employment, Congress added a provision:

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* See: H. Conf. Rep. No 1908, 90th Cong., 2nd Sess., p. 2 (1968), 1968 U.S. Code Cong. and Admin. News, p. 3957; 93rd Cong., 1st Sess., 119 CONG. REC. S15238 (daily ed. July 31, 1973); 93rd Cong., 1st Sess. .119 CONG. REC. S21463 (daily ed. November 29, 1973); 93rd Cong, 2nd Sess., 120 CONG. REC. H5598 (daily ed. June 21, 1974).

"Refusal to work at a plant or site subject to a strike or a lockout for the duration of such strike or lockout shall not be deemed to be a refusal to accept employment." 7 U.S.C. § 2014(c).

It is important to note that this provision refers to the employee's refusal to work at *his own site or plant* during a strike as well as to take new work at a site involved in a strike. As previously noted, the stated reason for this treatment of strikers was Congress' determination not "*to take sides in labor disputes,*" (emphasis added) H.R. Rep. No. 1402, 91st Cong., 2nd Sess. (1970), 1970 U.S. Code Cong. & Admin. News, pp. 6025, 6035.

This congressional view of neutrality is fatal to petitioners' claim that State enactments according striker benefits thrust the State into an improper role under federal strictures.

### D. Aid to Families with Dependent Children—Unemployed Father.

Congress has also considered the exclusion of strikers from receipt of Aid to Families with Dependent Children—Unemployed Father (hereinafter "AFDC-U") benefits. In 1972, the Nixon Administration sought an explicit provision removing strikers as eligible persons under this program. S. Rep. No. 92-1230, 92nd Cong., 2d Sess. 108, 472-3 (1972). This proposal was deleted prior to a Senate vote, 118 Cong. Rec. 33992-5 (1972).* In 1973 legislation was intro-

* See *Super Tire Engineering Company* v. *McCorkle,* 550 F. 2d 903 (3d Cir.), *cert. den.,* 434 U.S. 827 (1977), *rehearing den.* —— U.S. ——, 54 L. Ed. 2d 773, where the Third Circuit rejected the argument that a state provision permitting the payment of welfare to strikers violated federal welfare law and the NLRA. This resolution of the challenge to such payments has significant implications

*(footnote continued on following page)*



duced in the House which would have mandated striker eligibility for benefits in those states which participate in the AFDC-U program. These bills were defeated. H.R. 9422, 9748, 9903, 93rd Cong., 1st Sess. (1973).

Prior to 1968, each State established its own definition of the term "employment" under its AFDC-U program (42 U.S.C. § 601, *et seq.*). Some States included strikers in the definition while others did not. The 1968 amendments to the Social Security Act* were designed to provide a more uniform application of the AFDC-UF program. Even under these amendments, despite legislative history describing their intent as requiring "a uniform definition of unemployment throughout the United States," local options were *preserved* by the Secretary of Health, Education and Welfare in a regulation upheld by this Court. *Batterton* v. *Francis,* 432 U.S. 416, 429-432 (1977). Under the NLRA, however, a uniform national standard which would have

*(footnote continued from preceding page)*

in the case at bar. It is important to note at the outset that unemployment benefits, unlike welfare payments, are available in New York only in the small percentage of strikes that are greater than eight weeks. Moreover, under petitioners' rationale, the consequence of paying welfare benefits to needy persons is to provide economic aid to the group of strikers who cannot afford to be without a salary and thus would otherwise quickly return to work. Welfare assists strikers as to whom there has *been a finding that they have no alternate resources available.* Since such eligibility does not conflict with the federal labor laws, the New York statute clearly does not contravene any congressional prohibition. As the Fourth Circuit held in *Francis* v. *Chamber of Commerce of the United States,* 529 F. 2d 515 [text unreported, 4th Cir., Sept. 22, 1975, 74 Civil 1991], reversed on other grounds *sub nom. Batterton* v. *Francis,* 432 U.S. 416 (1977): "We do not view the national labor policy and the national social policy as irreconcilable, but if they are so viewed, there is presented a policy question for the Congress that is not for us to decide." (Slip. op. p. 4).

* 81 Stat. 882, 42 U.S.C. § 607(a).

applied to receipt of unemployment insurance by striking workers was *rejected* by Congress.*

### E. The Message of the Legislative History.

Petitioners' attempt to characterize this legislative history as "unconnected" and inconsistent (p. 33) signally fails to deal with the wealth of material supporting the unanimous decision of the Second Circuit.**

What conclusion must be drawn from explicit Committee reports, floor debate, pertinent statutory provisions, and recent congressional amendments, all relating to requiring or permitting the payment of unemployment compensation to strikers, and all consistent in demonstrating that Congress does not view the disqualification of strikers for benefits as essential to the NLRA's regulatory scheme? This Court considered precisely the same kind of legislative history, based on the same kind of documents in *Hodory, supra,* 431 U.S. at 488. In rejecting preemption

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* *Supra,* p. 42 Petitioners, however, maintain that Congress has willed "enforced national uniformity" in this area (p. 41).

** See also the detailed legislative history of the Social Security Act in Point I A, *supra.* Petitioners call these expressions of policy "silence" and "inaction" (p. 34), despite testimony on the floor of Congress (see e.g. statements of House Ways & Means Committee Chairman (p. 30, *supra*), and the enactment of bills which mandate the payment of benefits to striking employees. Their reference (p. 35) to 2A Sutherland, ***Statutory Construction,*** § 49.10 at 261 (4th ed. 1973) is also inapposite, since that discussion concerns acquiescence or inaction by a Legislature as a poor basis for presuming the *adoption* (not rejection) of a new statutory requirement.

It should be noted that this Court was guided by "[t]he fact that Congress has chosen *not* to legislate on the subject of labor dispute disqualifications" (emphasis added) in rejecting the preemption challenge posed in *Ohio Bureau of Unemployment Services* v. *Hodory, supra,* 431 U.S. at 488-489.



claims under FUTA and the Social Security Act, this Court held:

> "[S]tudy of the various provisions cited shows that when Congress *wished to impose* or *forbid* a condition for compensation, it was able to do so in explicit terms." (Emphasis added).

It is indisputable that Congress is similarly capable of requiring or prohibiting a condition for payment of benefits under the NLRA.

## III. THE ELEVENTH AMENDMENT APPLIES TO SUITS FOR MONEY DAMAGES AGAINST THE NEW YORK STATE DEPARTMENT OF LABOR AND THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, SEEKING RETURN OF TAXES PAID TO THE STATE'S UNEMPLOYMENT INSURANCE FUND.

Petitioners seek from the State of New York a refund of taxes paid under Article 18 of the New York Unemployment Insurance Law. Since, as was undisputed below, New York State has not consented to a suit for money damages in federal court, the case falls squarely within the prohibition of the Eleventh Amendment.*

This Court has set out the fundamental principles of the Eleventh Amendment in a decision directly applicable to the case at bar. In *Edelman* v. *Jordan,* 415 U.S. 651, *rehearing denied,* 416 U.S. 1000 (1974), the plaintiff alleged that Illinois state officials administered a Federal-State program of Aid to the Aged, Blind and Disabled (AABD) in a manner inconsistent with certain federal regulations and the Fourteenth Amendment. The District Court granted declaratory and injunctive relief and ordered state officials to remit AABD benefits wrongfully withheld to eligible applicants, and the Court of Appeals affirmed.

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* That amendment, adopted in 1795 and ratified in 1798, provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The District Court herein held that the Eleventh Amendment did not bar petitioners' claim for money damages (Pet. 53a-54a). The Second Circuit did not reach the question, since it reversed the District Court on other grounds and directed that the complaint be dismissed (Pet. 18a).



This Court reversed. Looking to the historical evolution of the Amendment, it concluded (415 U.S. at 663):

> ". . . the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."*

Petitioners in the instant case ascribed a hidden restrictive intent to this Court's use on several occasions of the phrases "state treasury" and "general revenues", and concluded that since the Unemployment Insurance Fund is separate from the general state treasury, *Edelman* did not foreclose "retroactive damages"** in the case at bar. Such an interpretation is erroneous. It is clear on reading *Edelman* as a whole that these terms were used in their generic sense to include all State funds. *Edelman* bars all suits when the action "is in essence one for the recovery of money from the state" (p. 663, quoting with

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* It is clear that the State is the real, substantial party in interest and is entitled to invoke its sovereign immunity even though, as here, individual officials or state agencies are the named and nominal defendants. *Ford Motor Co.* v. *Dept. of Treasury,* 323 U.S. 459, 464 (1945).

** Petitioners' Memorandum in the Second Circuit, pp. 91-92. It may be noted that Unemployment Insurance Law § 550(3) simply insures that the tax collected pursuant to § 560.1 is available solely for the benefit of unemployed workers. The tax rates are calculated so as to provide sufficient revenue for this purpose. § 550(4) reflects the fact that the federal government underwrites administration expenses of the Fund. 28 U.S.C. § 3304(a)(4)(B). Under § 550.1, all contributions immediately become part of a pooled fund available to pay benefits to any individual entitled thereto and no employer acquires any prior claims or rights to the sums credited to its account. No matter how much the total of contributions paid by an employer during its lifetime may exceed the benefits collected by its former employees, the employer has no right to obtain any refund therefor, nor is it entitled to a credit of any kind other than its use as a means of measuring its experience for the establishment of its prospective contribution rate (§§ 550, 581).

approval from *Ford Motor Co.* v. *Dept. of Treasury,* 323 U.S. 459 [1945]); involves "substantial expenditures from the public funds of the state" (p. 665, quoting with approval from *Rothstein* v. *Wyman,* 467 F. 2d 226 [2d Cir. 1972], *cert. denied,* 411 U.S. 921 [1973]). The basic constitutional proscription as restated in *Edelman* operates to bar suits to recover any public funds absent the State's consent. That these public moneys may be in one fund or another is of no moment to this principle.*

This Court's decision in *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976) results from a specific constitutionally sanctioned exception to the holding in *Edelman, supra,* and supports respondents' position that Telco's attempt to obtain a refund of taxes is barred by the Eleventh Amendment. In *Fitzpatrick,* the plaintiffs, consisting of all present and retired male Connecticut employees who were members of the State Employees' Retirement System asserted, *inter alia,* that the State Employees Retirement Act discriminated by sex and thereby violated Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e. The plaintiffs

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* Here petitioners seek recrediting of their unemployment insurance accounts, retroactive to the commencement of benefit payments to strikers in 1971, in the amount paid out as the result of the 1971-1972 CWA strike, and the reimbursement of payments of taxes in excess of those which would have been due if unemployment insurance had not been paid during the 1971-1972 strike.

In suits seeking recovery of retroactive benefits, the immunity of the Eleventh Amendment must be given full force. Characterization of the relief as a "refund" or "equitable restitution" rather than damages does not dictate a different result. *Ford Motor Co.* v. *Dept. of Treasury, supra.* This Court specifically rejected this approach in *Edelman,* holding that the relief requested must be judged "in the context of the important constitutional principle embodied in the Eleventh Amendment." *Edelman, supra,* 414 U.S. at 666 (footnote omitted). The substantive nature of the remedy sought controls, not the formal label attached to it.



sought retroactive benefits from the Retirement Fund, to which the State was required to provide by appropriation at least 75% of the retirement income paid each year.

*Fitzpatrick* held that because the enforcement provision (§ 5) of the Fourteenth Amendment specifically authorized suits against the State and it was pursuant to § 5 that Congress enacted Title VII, the Eleventh Amendment did not bar the payment of the retroactive retirement benefits demanded by plaintiffs.* This Court stated (427 U.S. at 456):

> "We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are *constitutionally impermissible in other contexts* . . ." (Emphasis added).**

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* In the instant case, the District Court's Memorandum and Order of March 26, 1975 denying respondents' motion for summary judgment expressed "substantial doubt" as to the validity of petitioners' equal protection and due process claims. The Second Circuit rejected the Fourteenth Amendment contentions set forth in the complaint, noting that this constitutional provision does not give the federal courts the power to impose their views on economic and social policy on the States, that the statute meets substantive due process requirements, and that no violation of procedural due process was claimed (Pet. 17a-18a). Petitioners relied below primarily on their preemption argument.

Moreover, it is clear that Congress has not mandated by appropriate enabling legislation that firms which make payments into the unemployment insurance system be given the right to sue the States for claims arising out of the administration of the program. Petitioners have not met the requirements of *Fitzpatrick* and therefore may not avoid the strictures of the Eleventh Amendment.

** Aside from the bar against retrospective enforcement of this judgment under the Eleventh Amendment, *Edelman* v. *Jordan, supra,* retroactive relief would be unwarranted. A statute in

*(footnote continued on following page)*

See also *Hutto* v. *Finney,* —— U.S. ——, 46 U.S.L.W. 4817 (June 23, 1978), where award of attorneys' fees against a State was affirmed on the grounds that such fees 1) served the purpose of a remedial fine imposed to insure enforcement of prospective relief and 2) constituted costs, which have traditionally been granted without regard to the Eleventh Amendment. This Court noted (46 U.S.L.W. 4822, n.33) that the claim was based on a statute enacted to enforce the Fourteenth Amendment, as in *Fitzpatrick* v. *Bitzer, supra,* rather than on "a statute rooted in Congress' Article I power," such as the rejected claims in *Edelman* v. *Jordan, supra.*

In light of the strict limitations placed by *Fitzpatrick* v. *Bitzer, supra,* on judicial incursions into the Eleventh Amendment area, it is clear that the case of *Bowen* v. *Hackett,* 387 F. Supp. 1212 (D.R.I. 1975) relied on by petitioners below (at pp. 92-94) cannot provide authority for Telco's contentions. Moreover, the confusion in the *Bowen* court's analysis also demonstrates that its holding is erroneous. It relies upon cases involving turnpike authorities to find that the Eleventh Amendment may not shield programs administered by "an agency or instrumentality . . . created by the state legislature [to perform] certain governmental functions."* This description does not appear to apply to the Rhode Island program, and obviously does not apply to the New York situation where the law under

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full force and effect for over forty years is entitled to a presumption of constitutionality in its application, until it is conclusively ruled otherwise. *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 107 (1971). Even assuming *arguendo* the correctness of petitioners' claims, the State was entitled to rely on the validity of this 1935 law and a judicial ruling must therefore be limited to prospective application.

* *Bowen, supra,* 387 F. Supp. at 1220.



attack is administered by an *executive department* of the State government without the "indicia of independence from the sovereign"* sometimes found in a special operating authority (such as a turnpike authority).

As is obvious from the caption of this action, respondents in the instant case are State departments and officials. These revenues are administered by the State.** The State Commissioner of Taxation and Finance is the legal custodian of the funds, which may only be disbursed by the Industrial Commissioner subject to prior approval by the State Comptroller. The State Commissioner of Taxation and Finance may deposit any funds not needed for immediate use in the same manner as he may deposit *"other state funds."* Unemployment Insurance Law § 550(2) (Emphasis added).

Nor does the source of State funds provide a basis for evading the Eleventh Amendment's proscription. See e.g. *Wade* v. *Mississippi Co-op. Extension Service,* 424 F. Supp. 1242 (N.D. Miss. 1976), where the court rejected the contention that a judgment for back pay would not be barred by the Eleventh Amendment if such judgment were payable "from private contributions or federal grants or mineral leases on federally-granted state lands held in their name or other similar non-appropriated funds." The court ruled:

> "Albeit such payment would not be literally out of the general treasury, payment of damages from any

* 387 F. Supp. at 1222.

** Contributions by employers are excise taxes based upon utilization of the privilege of employing individuals; the employer must continue to pay the tax regardless of the aggregate of benefits, if any, paid to his former employees, and all eligible and qualified persons have the right to receive benefits. *Matter of Cassaretakis,* 289 N.Y. 119, 126 (1942), affd. 319 U.S. 306 (1943).

source of funds—assuming the court could properly authorize such a payment—would directly deplete the funds otherwise utilized by these non-autonomous, nonprofit state agencies in performing their important governmental, nonproprietary functions." (424 F. Supp. at 1257.)

This rationale is clearly applicable in the case at bar, where state agencies are administering the state funds at issue for vital state purposes. The fact that the moneys here were originally paid as taxes by the employer does not remove the bar of the Eleventh Amendment. As this Court has held, employers participate in the unemployment insurance program as taxpayers, and their obligation is to the State. *Carmichael* v. *Southern Coal and Coke Co., supra,* 301 U.S. at 508. *NLRB* v. *Moss Planing Mill Co.,* 224 F. 2d 702, 704 (4th Cir. 1955).

Cases which find that local school boards are not immune from damages under the Eleventh Amendment are inapposite. See *Hander* v. *San Jacinto Junior College,* 519 F. 2d 273 (5th Cir. 1975); *Adams* v. *Rankin County Board of Education,* 524 F. 2d 928 (5th Cir. 1976); *Unified School District* v. *Epperson,* 551 F. 2d 254 (10th Cir. 1977), reversed on other grounds, *sub nom. Smalling* v. *Epperson,* —— U.S. ——, 46 U.S.L.W. 3615 (1978). In all these cases, the inquiry was whether local political subdivisions, such as counties and municipalities, could partake of the State's Eleventh Amendment immunity. Cf. *City of Lafayette* v. *Louisiana Power & Light Company,* —— U.S. ——, 98 S. Ct. 1123, 1136 (1978).

The courts in the school board cases looked to several elements in answering this inquiry. They found that school boards are accorded a higher degree of autonomy and indipendence than state agencies, as public education is traditionally a matter of local concern rather than state control. *Hander, supra,* p. 278; *Adams, supra,* p. 929; *Unified*



*School District, supra,* p. 260. The *Unified School District* decision also noted that the funds at issue were raised by local levy within the school district and were not part of the state treasury. By contrast, as previously shown, the State's Unemployment Insurance Fund is controlled and administered solely by state officials.* It is a creation of State statute, funded on a statewide basis, without the power to levy taxes on its own behalf or to raise additional funds in any manner, and in no way autonomous from the State. Petitioners' challenge is to a statewide program,** and the rate of employer contributions is set by the State (Unemployment Insurance Law, § 570). Since these contributions are neither raised nor administered locally, the fact that the moneys are contained in a particular state fund is irrelevant to the operation of the Eleventh Amendment. See *Wade* v. *Mississippi Co-op. Extension Service, supra.* Moreover, Unemployment Insurance Law § 551 provides that if any moneys properly committed to the Fund are inappropriately expended,

"... it is the policy of this state that such moneys be replaced by moneys to be transferred from the

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* The federal statutory scheme permits only the States and State officials to participate in the administration of unemployment insurance programs. The Social Security Act provides for federal grants "for the purpose of assisting the States in the administration of their unemployment compensation laws . . ." (42 U.S.C. § 501) and the amount of the federal funding is in part determined by the population of the State (42 U.S.C. § 502). If the Secretary of Labor determines that a State's administration of the program is not in conformity with the Social Security Act and the Federal Unemployment Tax Act he must so advise the Governor and the State may petition for judicial review of the Secretary's determination (42 U.S.C. §§ 503, 504; 26 U.S.C. §§ 3304, 3310).

** Another example of state moneys derived from employers and kept separate from the state treasury is the Disability Benefits Fund of the State Insurance Fund, from which disability benefits to injured employees are paid. See Workmen's Compensation Law, §§ 76, 204.

special fund or appropriated for such purpose from the *general revenues of this state* . . . If the moneys available in the special fund are not sufficient for this purpose, the Commissioner *shall* promptly report the additional amount required for such replacement to the governor and the governor *shall,* at the earliest opportunity, submit to the legislature a request for the appropriation of such amount." (Emphasis added).

It was also held that the State's own definition of the entity in question, as found in statute and case law, was crucial. *Hander,* pp. 278-280, *Unified School District,* pp. 259-260. This Court found in *Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274 (1976), that petitioner local school board was "more like a county or city than it is like an arm of the State," in part because under Ohio law the "State" does not include "political subdivisions," while the term "political subdivisions" does include local school districts. (429 U.S. at 280).* See in accord *Jagnandan* v. *Giles,* 538 F. 2d 1166 (5th Cir. 1976), where it was held that the Eleventh Amendment barred a claim for reimbursement of excess tuition payments made under a statute declared to be unconstitutional. The Fifth Circuit relied upon Texas statutory and decisional law in reaching its conclusion. (538 F. 2d at 1174-1178).

In the case at bar, state law on the status of the Unemployment Insurance Fund is clear. The State Legislature has determined that the moneys sought by Telco are "state funds." (Unemployment Insurance Law, § 550[2].) The New York State courts have also unequivocally so held. In *Manufacturers Trust Co.* v. *Corsi,* 61 N.Y.S. 2d 769, 770

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* See also *Monell* v. *Department of Social Services of the City of New York,* —— U.S. ——, 46 U.S.L.W. 4569, 4580 n.63 (June 6, 1978), where this Court referred to the congressional definition of "local educational agency" as dependent upon such an entity's status under state law.



(Sup. Ct., N.Y. Co., 1946), plaintiff brought an action against the State Industrial Commissioner to recover moneys exacted from plaintiff as contributions to the Fund. The court dismissed the suit, ruling:

> "A successful recovery by plaintiff would . . . inevitably diminish the amount of moneys available for use by the State for the relief of unemployment. Consequently, any action to recover moneys exacted under the Employment Insurance Law, when brought against the Industrial Commissioner in his official and public capacity, *is one wherein the State,* though not added as a party defendant, *is the real person against whom any judgment for plaintiff will operate.*
>
> "The prosecution of claims and actions against the sovereign State may be brought only in a forum in which it has consented to be sued." (Emphasis added).

The same principle has been established by this Court. In *NLRB* v. *Gullett Gin Co.,* 340 U.S. 361, 364 (1951), it was held:

> "Payments of unemployment compensation were not made to the employees by respondent [employer] but by the state out of *state funds derived from taxation.* True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state." (Citations omitted) (Emphasis added)

Thus, petitioners' quest for a refund, like their search for a preemptive federal provision, must collide with the law as established by Congress, the New York State Legislature, and the federal courts.

## CONCLUSION

**For all the reasons stated herein, the decision below should be affirmed.**

Dated: New York, New York
August 11, 1978

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
FILED
OCT 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-961**

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

—v.—

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

v.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITIONERS' REPLY BRIEF

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### Preliminary Statement

The facts in this case, as found by both courts below, lay bare an open clash between New York's grant of employer-financed unemployment compensation to strikers and the national labor policy mandating government neutrality in labor disputes. That national policy leaves the outcome of

collective bargaining to the " 'free play of economic forces.' " *Lodge 76, IAM* v. *Wisconsin Employment Rel. Comm'n,* 427 U.S. 132, 140 (1976), quoting *NLRB* v. *Nash-Finch,* 404 U.S. 138, 144 (1971). So substantial is the conflict that although respondents[1] attempt to dismiss it as "irrelevant to the legal issues confronting this Court" (State 4),[2] they nevertheless seem impelled to try, albeit unsuccessfully, to blunt the force of the record facts which proved the conflict (State 4-14).

The State argues in effect that the detection of Congress' preemptive intent must be made *in vacuo;* inferred from a patchwork of unconnected items of legislative history, without any consideration of the significance of the national policy infringed upon, its central place in the labor relations scheme structured by Congress, or the extent of the infringement as found below. But "decipher[ing] the presumed intent of Congress," this Court has cautioned, is a "more complicated and perceptive process than is conveyed by the delusive phrase 'ascertaining the intent of the legislature.' " *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 239-40 (1959). Indeed, preemption questions need to be "translated into concreteness by the process of litigating elucidation." *IAM* v. *Gonzales,* 356 U.S. 617, 619 (1958). This is particularly so in a case such as this where Congress' claimed intent to depart from its own policy of national uniformity must be ascertained by inference, not discerned from express articulation.

The nature and extent of the conflict between state and federal law, as interpreted and applied, bear significantly on the resolution of preemption claims. This is the frame-

[1] Hereafter collectively referred to as "the State".

[2] Reference is to the Brief for Respondents.



work within which this Court has repeatedly resolved preemption issues in the past, as illustrated by the cases discussed in Point I of our main brief. And it was within just such a framework that the specific preemption issue now before this Court was treated by the United States Court of Appeals for the First Circuit in *Grinnell Corp.* v. *Hackett,* 475 F.2d 449, *cert. denied,* 414 U.S. 858, 879 (1973), and by the district courts both in this case and in *Hawaiian Tel. Co.* v. *Hawaii Dep't of Labor & Indus. Rel.,* 405 F. Supp. 275 (D. Hawaii 1975), *appeals docketed* (9th Cir. Mar. 19 and May 22, 1976) (Nos. 76-1584, 76-2056), *cert. prior to circuit court decision denied,* 46 U.S.L.W. 3599 (U.S. Mar. 27, 1978) (No. 77-962).

This Court's opinions in cases such as *Lodge 76, IAM* and *Teamsters Local 20* v. *Morton,* 377 U.S. 252 (1964), define the applicable federal preemption principles for determining an issue such as that here involved. Yet they are all but ignored in the State's brief[3] and in the *amici* briefs supporting its position. As they would have it, preemption analysis would begin and end in a search of the legislative history for congressional guidance. But the controlling principles to be applied in labor preemption cases such as this one were "born of this Court's efforts, *without the aid of explicit congressional guidance,* to delimit state and federal judicial authority over labor disputes." *Street, Elec. Ry. & Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 286 (1971) (emphasis supplied). Their application here, as discussed in Point I of our main

[3] The State relegates *Lodge 76, IAM* to a footnote (State 31) where it unsuccessfully attempts to distinguish that case from the one at bar. See discussion at pp. 8-9, *infra.*

brief, requires reversal of the Court of Appeals' decision under review.[4]

Against this background we proceed to examine the approaches taken by the State and those taken respectively by the Solicitor General and by the AFL-CIO as *amici*. The notable differences, indeed outright inconsistencies among them, bespeak the inherent unsoundness of the common conclusion they seek to draw.

## I

### The Conflict Between New York's Law and National Labor Policy.

The State's brief alternates between a claim that a trial is an "unsuitable vehicle" for deciding a preemption claim (State 4) and an all-out attempt to reargue the findings made by the District Court and accepted by the Court of Appeals (State 4-14). In the face of these findings and the massive documentary evidence, expert opinion and other record evidence which underlie them, the State's discomfort with the revelations of a trial is understandable.

The AFL-CIO brief, like the State's brief, rejects the *Grinnell* requirement of a trial such as was conducted

[4] The State and the AFL-CIO (the national and New York State AFL-CIO are jointly referred to herein as "AFL-CIO") seek to avoid the application of normal preemption analysis by trying to recast this case into the mold of *Malone* v. *White Motor Corp.*, 46 U.S.L.W. 4295 (U.S. Apr. 3, 1978) (No. 76-1184). *Malone*, as we shall see at pp. 15-17, *infra*, is clearly distinguishable on several grounds. Suffice it to say here that in *Malone* the Court found "clear" congressional guidance while, in marked contrast, the Court of Appeals in this case acknowledged the absence of any "positive expression of congressional intent" in the legislative record (Pet. 7a).



here (AFL-CIO 3).[5] Seeking to downplay its outcome, the AFL-CIO decries the appropriateness of a "battle of experts." As far as the documentary evidence emanating from unions acknowledging the value of unemployment compensation as a strike weapon is concerned, the AFL-CIO maintains a discreet silence. See Pet. 29a-33a.

The Solicitor General, however, effectively disassociates himself from the positions of the State and the AFL-CIO. Thus he frankly reports in his brief with respect to the Bell System strike which gave rise to this case that

> the district court found that the state unemployment compensation benefits in fact influenced the willingness and ability of employees to continue the strike (Pet. App. 28a-38a). It further found that the employers' resolve to withstand a strike was affected by the fact that their unemployment insurance account was approaching a negative balance (Pet. App. 27a-28a). The court concluded that, by altering "the balance of power among competing forces," the New York law conflicts with the policy of free collective bargaining established in the federal labor laws (Pet. App. 42a, 43a)....
>
> The court of appeals reversed. The court did not distrub the district court's finding that the New York law affected the balance of economic strength in the bargaining process. [Solicitor 3-4][6]

The Solicitor General further stated with respect to the overall impact of New York's law on strikes in general:

> The district court found that the availability of unemployment compensation to strikers under the New

[5] Reference is to the Brief for the American Federation of Labor and Congress of Industrial Organizations and the New York State AFL-CIO as *Amici Curiae*.

[6] Reference is to the brief for the United States as *Amicus Curiae*.

> York law increased the ability of employees to carry on the strike and weakened the resolve of employers to withstand it. *On the basis of these express findings, we do not dispute the correctness of the district court's conclusion that the availability of unemployment compensation under the New York statute has altered the economic balance between the bargaining parties.* [Solicitor 6; emphasis supplied, footnote omitted][7]

The soundness of the Solicitor's determination not to seek to revive in this Court the factual disputes twice fought and lost by the State in the courts below is supported not only by the ample record made at trial but also by this Court's frequently reiterated "two-court" rule under which it will not disturb concurrent factual determinations "by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).[8]

The District Court's findings in this case, accepted by the Court of Appeals, concerning the substantial impact exerted by New York's law are consistent with this Court's prior assessment of the impact of unemployment compensation on collective bargaining and strikes. Thus, referring

[7] The Solicitor's position was foreshadowed by his brief to this Court in *Kimbell, Inc.* v. *Employment Security Comm'n*, 429 U.S. 804 (1976), where it was noted that laws like New York's could have more impact than the New Mexico law involved therein. This distinguishing factor was again expressly acknowledged by the Solicitor in this case (Solicitor 6 n.6).

[8] The unwillingness of this Court to set itself against "the careful and reasonable conclusions of lower courts on purely factual issues" has particular force in cases, as the one at bar, where several of the disputed factual issues turned "on an assessment of the relative credibility of witnesses." *Berenyi* v. *Immigration Director*, 385 U.S. 630, 636 (1967).



to the added costs to the struck employer who is financing the unemployment benefits, this Court stated in *Ohio Bureau of Employment Servs.* v. *Hodory*, 431 U.S. 471, 492 (1977):

> The only way for the employer to stop these rising costs is to settle the strike so as to return the employees to work. Qualification for unemployment compensation thus acts as a lever increasing the pressure on an employer to settle a strike.[9]

## II

## The Applicable Preemption Principles.

Although the Solicitor, as previously stated, accepts the finding below that New York's statute "has altered the economic balance between the bargaining parties," he resists the full force of its legal implications. As this Court has repeatedly recognized, the states are forbidden to " 'upset the balance of power between labor and management expressed in our national labor policy.' " *Lodge 76, IAM*, 427 U.S. at 146, quoting *Morton*, 377 U.S. at 259-60. That New York may have chosen to alter the federally-prescribed balance out of a desire to accommodate the interests of the parties to a labor dispute in a way which would conform most closely to its own version of government "neutrality,"[10] as argued in the State's brief (State 34-37),

[9] This Court's decision in *Hodory* is discussed at pp. 54-55 of our main brief.

[10] The Court of Appeals concluded that New York's law represents "a good faith effort to strike a balance between neutrality in the collective bargaining process—which the State maintains for the first eight weeks—and the social and economic well-being of its citizens." Pet. 12a n.5. Given the availability of food stamps and welfare benefits in New York for citizens, including strikers, who can establish *need*, there is, we submit, no warrant for the State out of concern for its citizens' well-being to intrude further

does not justify its intrusion into an area Congress left to the "'free play of economic forces.'" *Lodge 76, IAM,* 427 U.S. at 147, quoting *Nash-Finch,* 404 U.S. at 144. It is just such a diversity of various states' concepts of "balance" or "neutrality" that cannot be condoned if there is to be a uniform national policy.

The "economic weakness" of a party to a labor dispute —whether experienced in week one or week eight—"cannot justify state aid," for the "'use of economic pressure . . . is not a grudging exception [under] . . . the [federal] Act; it is part and parcel of the process of collective bargaining.'" *Lodge 76, IAM,* 427 U.S. at 149. State legislatures, this Court has cautioned, are

> without authority to attempt to "introduce some standard of properly 'balanced' bargaining power" . . . or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining." [*Id.* at 149-50]

The State in its brief (State 31) asks that *Lodge 76, IAM* be read narrowly to forbid state intrusion only where state law seeks to "police" the parties to a labor dispute or where it "brand[s] as unlawful" a specific economic tool. In short, it argues in effect that although the states may not *ban* resort to an economic tool, they may *create*

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and more pervasively into the collective bargaining arena through the payment of unemployment compensation to strikers, a benefit which under New York's law is payable with certainty to *all* strikers at a fixed time *regardless of need* and which is totally financed by the struck employer.

It should not be supposed from this discussion that the well-being of strikers and their families was the main consideration behind this legislation. Indeed, the trial judge commented that the "avowed purpose of the New York Labor Law was subverted for the purpose of mere administrative convenience" (footnote omitted) (Pet. 39a). See Pet. 38a-42a and pp. 17-18 of our main brief.



one equally, if not more potent, to be financed by one party for the benefit of the other. No such reading is suggested by the Court's holding nor by the language of the majority or concurring opinions in that case. In *Lodge 76, IAM,* the Court declared illegal Wisconsin's intrusion into a labor dispute to assist an employer which had been unable to achieve its objectives in collective bargaining by economic self-help means. Similarly forbidden under that case's rationale, we submit, is New York's intrusion into the collective bargaining arena after eight weeks to assist strikers and their union representative who had not achieved their negotiating objectives by self-help means.

When considered against the backdrop of this Court's opinion in *Lodge 76, IAM* and of its decisions in like cases, the Solicitor's argument that there is warrant for the "assumption"[11] that Congress intended to permit experimentation among the states in the area of unemployment compensation for strikers seems particularly tenuous. Certainly no assumption or inference can be made or drawn that Congress was willing to permit state-by-state alteration of the economic balance it had so delicately struck in the federal labor laws. Indeed no such assumption has ever been made by this Court in its preemption decisions. On the contrary, where state law has threatened to upset the economic balance created in the federal labor law, this Court has consistently preempted the state law, regardless of whether the state has acted through its own labor law as in *Lodge 76, IAM,* its antitrust law as in *Connell Constr. Co.* v. *Plumbers Local 100,* 421 U.S. 616, 635-36 (1975), or its unemployment insurance law as in *Nash* v. *Florida Indus. Comm'n,* 389 U.S. 235 (1967). Moreover, state experimentation is especially inappropriate in the

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[11] Solicitor 11.

domain of labor relations inasmuch as it was the perceived (by Congress) inability of state legislatures to stabilize conflict in that area that led it to enact a uniform, comprehensive federal labor law in the first place. *Lockridge*, 403 U.S. at 286.[12]

Before such a fundamental labor law concept as government neutrality is disavowed, and before it is forced to yield to separate determinations by the several states concerning whether, how and when strikers are to be subsidized in labor disputes under the mantle of unemployment insurance, a clearer and more positive expression of congressional will must be shown than is evident from the legislative record presented in this case. That record, we submit, is insufficient to form the basis for the major inroads upon well-established and fundamental federal labor policies such as those here involved.

## III

### The Claimed Scope of Permissible State Action.

Notwithstanding the absence of any positive expression of congressional intent either in the NLRA, as amended, in the federal unemployment insurance laws, or in any other federal enactment which might have some bearing on the subject, both the State (pp. 15, 21-23, 31) and the AFL-CIO (pp. 16-19, 31) espouse the view that Congress intended to invest each state with the right to determine its own policy regarding unemployment compensation for strikers, regardless of its impact on federal labor policy.

In this basic premise (which lies at the very core of their legal arguments in this case) the State and AFL-CIO

[12] See pp. 41-42 of our main brief.



are at odds with the Solicitor General. Speaking in his brief for the United States, the Solicitor states (p. 8 n.8):

> We do not suggest, however, that Congress afforded the states a blank check to enact any unemployment compensation provision they desire without regard to the demands of national labor policy.

This stand is confirmed in the closing pages of the Solicitor's brief (p. 25 n.25) wherein, after suggesting that it is unnecessary here to determine the "ultimate scope" of the options open to the individual states as far as unemployment payments to strikers are concerned, he acknowledges that whatever "freedom" of choice may exist, there are situations in which unemployment compensation for strikers would be "so destructive of the principles of the NLRA as to be beyond the contemplation of Congress."

This Court's decision in *Nash* v. *Florida Indus. Comm'n*, 389 U.S. 235 (1967), stands as a refutation of the underlying premise advanced by the State and AFL-CIO in the case at bar. For in *Nash* the Court was called upon, as here, to assess the consequences of a conflict between the national labor policy and a state's unemployment compensation eligibility requirements. Its decision established the principle, equally applicable here, that state unemployment insurance eligibility requirements which tend to "frustrate" the purposes of the national labor legislation or stand as an "obstacle" to their full accomplishment must be outlawed. In this regard, state unemployment compensation laws must yield to federal superintendence in the labor field.[13]

[13] For a full discussion of *Nash*, see our main brief at pp. 27-29, 44-45.

The markedly different approaches employed by the State and the *amici* urging affirmance (State 30; AFL-CIO 12-15; Solicitor 8-9 n.8) in their efforts to distinguish *Nash* —the only previous labor preemption case decided by this Court involving state unemployment insurance eligibility requirements—in the end re-enforce the validity of that decision as a guiding precedent here.[14]

The Solicitor's approach is especially noteworthy. Discerning no difference in principle between *Nash* and this case, he seeks to distinguish them by arguing that the conflict between state and federal policy posed in *Nash* was not in the contemplation of Congress when it enacted the Social Security Act in 1935, while New York's grant of unemployment benefits to strikers "was within the express contemplation of Congress" (Solicitor 9 n.8). Essentially he bases his position on the view that Congress intended to approve the New York statute in particular. Although the Solicitor speaks at times in more sweeping terms (Solicitor 9), he is careful to keep open the possibility that some state laws granting payments to strikers

[14] The AFL-CIO's theory (AFL-CIO 12-15) that it was a broad "presumption" protecting an individual's right to resort to a remedial tribunal and not the federal labor policy which was the basis for preempting the state unemployment law in *Nash* is refuted by the Court's opinion there which discusses in detail the federal labor policy being interfered with and concludes that a "national system for the implementation of this country's *labor policy* is not so dependent on state law" (389 U.S. at 239; emphasis supplied).

The State in its brief (p. 30) recognizes that the specific provision of the NLRA involved in *Nash* did not by its express terms apply to the states or to state unemployment compensation laws, but it fails to square these facts with its central position in this case that the *only* limitations on the states in enacting unemployment eligibility requirements are those few prohibitions set forth in Section 903(a)(5) of the Social Security Act (State 22-23, 31). That position is completely at odds with the holding in *Nash*.



may have to yield to the federal labor policy (Solicitor 8 n.8, 25 n.25).

The conjecture that Congress was aware of the striker-benefit provision in New York's law at the time it enacted the NLRA and the Social Security Act of 1935 is not supported by the legislative record. For that record is barren of reference to a single item of evidence that Congress was aware of the existence of New York's striker-benefit provision, let alone the impact of that provision as written or as subsequently amended and applied.[15] In 1935 when Congress was enacting the federal labor and social security laws, not one penny in unemployment compensation had been paid out to any striker in New York. As discussed in our main brief (pp. 51-52), not even the drafters of New York's law were able to foresee the growing impact of that law on strikes and collective bargaining that has developed over the subsequent years.

The Solicitor's speculation that Congress approved New York's law in particular, and his appraisal that the New York law is not so destructive of principles in the NLRA as to have been beyond the contemplation of Congress, are especially questionable in this case where the strike being subsidized by State unemployment benefits was declared illegal by the National Labor Relations Board because it was in violation of Section 8(d) of the NLRA.[16]

[15] See pp. 49-52 of our main brief. The Solicitor acknowledges that the committee report on the Social Security Act of 1935 does not refer to the "specific feature" of New York's law under which benefits to strikers are granted (Solicitor 11). The AFL-CIO admits that Congress did not "address" the "question of benefits for strikers" in 1935 (AFL-CIO 4).

[16] A violation of this provision's prescribed 60-day bargaining period free from strikes and lockouts is no mere "technical" matter lightly to be dismissed, as the State would have it (State 6).

See p. 8 n.8 of our main brief. The argument pressed here —that it should be assumed that Congress was approving state subsidies to support strikers whose very act of striking was in violation of express prohibitions contained in its own labor laws—simply emphasizes the extremity to which the State and the *amici* urging affirmance have been driven.

Beyond the argument of implied congressional approval, the Solicitor is silent as to the major role unemployment compensation plays in keeping strikes alive in New York. See our main brief, pp. 5-17. If the payment of 49 million dollars to strikers in a single strike, all of which is charged against their struck employers, is not sufficiently destructive of the federal labor policy to invoke preemption, then one must attribute to Congress a willingness to see its national labor policy violated in a major way and its uniformity destroyed. Nothing in the legislative history justifies such a conclusion.

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This provision is an integral part of the NLRA's scheme to achieve labor peace through collective bargaining without disruptions to commerce. It is unlikely that Congress was willing to tolerate state laws, such as New York's, which subsidize all strikes regardless of whether they are in violation of the federal labor law. For example, New York's law would, no doubt, pay benefits to strikers not only in strikes in violation of Section 8(d) of the NLRA, but also in strikes in violation of the secondary boycott provisions of Section 8(b)(4) and in violation of the Section 8(b)(7) ban against certain union organizational strikes. The suggestion that all this was comprehended and contemplated by Congress, and that Congress wished to tolerate it, surely calls for a far more clear expression of legislative intent than anything that is contained in the legislative record herein.



## IV

## The Misplaced Reliance on *Malone*.

The State and the *amici* supporting its position have seized upon *Malone* v. *White Motor Corp.*, 46 U.S.L.W. 4295 (U.S. Apr. 3, 1978) (No. 76-1184) as though it represented an authority controlling the case at bar. In so doing, they have misread and misinterpreted what we take to be the plain meaning of the case and the limitations of its holding.[17] The teaching of both the majority and minority opinions in that case is that before the Court will permit state interference with a fundamental concept of federal labor law (such as free collective bargaining), it will require *clear* evidence of legislative intention to permit such interference. It was solely on this basis that the majority opinion distinguished but did not depart from the Court's decision in *Teamsters Local 24* v. *Oliver*, 358 U.S. 283 (1959).

Thus the majority opinion at least four times states that the statute and surrounding legislative history in *Malone* is "clear" as to what Congress intended in enacting the 1958 Disclosure Act. Moreover, the Court majority quoted at length Sections 10(a) and (b) of the Act which it considered to be the most "reliable indicium of Congressional intent." 46 U.S.L.W. at 4297.[18] Along with these

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[17] See pp. 34-35 n.29 of our main brief for our discussion of how the holding in *Malone* is supportive of our arguments here in favor of preemption.

[18] The sections provide in pertinent part:

[Section (b)]

The provisions of this Act . . . shall not be held to exempt or relieve any person from any . . . duty . . . provided by any present or future law . . . of any State affecting the operation

express provisions which explicitly acknowledge state authority to regulate pension plans substantively, the Court majority found confirmatory evidence in the legislative history surrounding the 1958 Disclosure Act.

In the *Malone* majority's view the express statutory directive and the legislative history established that Congress had "clearly indicate[d]," "clear[ly] . . . contemplated," "clearly envisioned" and "clearly anticipated" a broad regulatory role for the states in the pension plan area. 46 U.S. L.W. at 4297, 4299. It is this repeated (by the Court majority) emphasis on the *clarity* of the language of the statute and of the re-enforcing legislative history, that apparently persuaded the *Malone* majority to distinguish *Oliver*. The dissent, of course, found that not even this legislative record was sufficient to overrule the federal policy of free collective bargaining.

The absence of any express statutory language in the NLRA, or in any other federal legislation, which specifically authorizes the states to legislate on the subject of unemployment compensation for strikers, in itself, effectively distinguishes *Malone* from this case. Also absent here are the relatively explicit statements of legislative intent contained in the legislative history which were present in *Malone*. Congress as a body never dealt with the subject of unemployment compensation for strikers in 1935 and

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or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law.

[Section (a)]
Nothing contained in this subsection shall be construed to prevent any State from obtaining such additional information relating to any such plan as it may desire, *or from otherwise regulating such plan.* [Emphasis supplied]



the Court of Appeals itself acknowledged that "a positive expression of legislative intent is lacking" here (Pet. 7a).

The *Malone* decision is distinguishable on several additional grounds. *Malone* involved the issue of whether a state may provide for the substantive regulation of pension plans, a subject which is but one of many mandatory subjects of collective bargaining under the NLRA. The issue here, however, strikes at the very heart of the collective bargaining process under the national labor policy, posing the question whether a state may intervene in a labor dispute to aid one party at the expense of the other and thereby alter the economic balance of power struck by Congress. A less aggravated state intervention was expressly forbidden by this Court in *Lodge 76, IAM.*

The nature and extent of the conflict between federal and state law is graver, more extensive and more critical here than in *Malone.* Accordingly, only the most explicit expression of congressional intent to "tolerate the conflict" could have justified overruling the clear case for federal preemption presented here. See pp. 7-8 n.10, *supra.*

## V

## The Legislative History.

### A. *Congressional Awareness and Intent in 1935.*

As previously noted, the State and *amici* supporting its position have failed to cite a single indication that Congress was aware in 1935 of the existence, much less the potential and extensive impact, of New York's unemployment insurance striker-benefit provision (see pp. 10-14, *supra,* and pp. 50-52 of our main brief). Nor is there any express provision on the subject in the NLRA or in the Social Security Act of 1935. The attempt in 1978 to convert this silence of Congress in 1935 into an affirmative intent would

indeed be stretching the interpretive process beyond supportable limits.[19]

The Solicitor cites relief payments to strikers by the Federal Emergency Relief Administration ("FERA") as indicating congressional awareness of FERA's policy of such payments. Building on this he would in turn infer congressional approval of unemployment compensation for strikers (Solicitor 11-12). But the inference is insupportable for several reasons: (1) there is no citation to any congressional record to support the underlying inference of congressional awareness of the FERA payments; (2) FERA payments, unlike unemployment compensation, were made on the basis of need and were not financed by the struck employer; and (3) there is no proof here as to the impact of such payments on strikes.

The State argues that Congress in 1935 would also have been aware of certain statistics concerning long strikes. However, the statistics cited were not published until 1937. State 25. Moreover, there is no evidence in the legislative record here that Congress ever considered these statistics in its legislative deliberations in 1935 or at any other time. As discussed in our main brief (pp. 50-52), the impact of New York's law in any event did not become apparent until later years and until after subsequent amendments, such as those involving experience-rating.

Ignored by the State and the *amici* supporting its position in their discussion of the legislative history is the

[19] The lack of evidence of congressional awareness in 1935 has driven the AFL-CIO to the extreme of citing a New York Times editorial (not a part of the record below) which appeared in a Saturday edition in April 1935 and which contained a single sentence referring to New York's striker-benefit provision (AFL-CIO 27-28). There is no proof that any member of Congress ever read it.



significance Congress placed on the need for a uniform national labor policy, which recognition is reflected in the NLRA. See our main brief 40-42. There is no indication in the legislative history that Congress was willing to subject this policy to the obstruction and frustration which would flow from state-by-state determinations concerning the grant of unemployment compensation to strikers.

**B. *Congress' Inaction in 1947.***

As discussed in our main brief (pp. 52-53), Congress' silence and the failure of a proposal to emerge from conference committee is not probative of the intent of Congress as a whole. Even where a specific congressional committee clearly states a position concerning its intent, this Court has recently observed, courts should be "'extremely hesitant to presume general congressional awareness'." *TVA* v. *Hill*, 46 U.S.L.W. 4673, 4683 (U.S. June 15, 1978) (No. 76-1701), quoting *SEC* v. *Sloan*, 46 U.S.L.W. 4426, 4431 (U.S. May 15, 1978) (No. 76-1607).

**C. *1969 Nixon Administration Proposal.***

The Nixon Administration's proposal in 1969 to bar unemployment compensation for strikers, as a part of broader legislation to amend the FUTA, was not considered by either house of Congress. A bill introduced by Chairman Mills, which did not contain any proposal on the subject of striker benefits, was approved by the House Ways and Means Committee and debated briefly before the House.[20] The Mills statement relied upon so heavily by the State (State 16, 29-30) and the *amici* (AFL-CIO 30-31; Solicitor 23) as a statement of "Congressional intent", significantly was made in response to a question unrelated to striker

[20] See 115 Cong. Rec. 34102-10.

benefits.[21] The House's passage of Mills' bill cannot be read as a rejection of the Nixon Administration's proposal on striker benefits since that proposal was neither included in the bill nor debated on the floor of the House. Furthermore, there is no evidence that the proposal was considered at all at any level in the Senate.

Considering the Mills statement in context—coming as it did almost 35 years after the pertinent federal legislation here under consideration was enacted—it is evident that it represents only the " 'personal view' " [22] of a legislator and " 'however explicit cannot serve to change the legislative intent of Congress' " at the time the pertinent legislation was passed in 1935. *TVA* v. *Hill,* 46 U.S.L.W. at 4684, quoting *Regional Rail Reorganization Cases,* 419 U.S. 102, 132 (1974).

**D. *Welfare and Food Stamps.***

In their heavy reliance on legislative history relating to the welfare and food stamp programs (State 17, 45-46; AFL-CIO 43-46; Solicitor 23 n.24), the State and *amici* urging affirmance simply ignore the crucial differences between these public assistance programs and unemployment insurance. Unlike public assistance, unemployment insurance for strikers (1) is certain of receipt at a fixed

[21] It related to the rights of retired municipal employees collecting disability benefits to collect unemployment compensation as well. 115 Cong. Rec. 34106.

[22] Other legislators have expressed a totally different view. Thus the Senate Finance Committee in a 1972 report supporting legislation which would have disqualified children of strikers from receiving AFDC (welfare) benefits, stated:

> This disqualification, adapted from the unemployment insurance laws, is designed to prevent the government financing one side of a labor-management dispute. [S. Rep. No. 92-1230, 92d Cong., 2d Sess. 108]



time and easy to qualify for,[23] (2) is financed solely by the struck employer and (3) requires no demonstration of need.

In cases of economic deprivation and on a showing of need, Congress has expressly and affirmatively provided for the disbursement of food stamps and permitted welfare benefits for strikers as part of *its* accommodation of the federal labor policy to other objectives. Its failure to do so with respect to unemployment insurance, if anything, manifests an intention not to permit unemployment compensation for strikers.

**E. *The Railway Unemployment Insurance Act.***

As we have discussed in our main brief (pp. 56-57), collective bargaining under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), is far less a free and unregulated economic struggle than it is under the NLRA. Thus, the payment of unemployment compensation to RLA strikers is not as significant an element in collective bargaining under that Act. The AFL-CIO seeks to diminish the importance of this distinction by pointing out that airline employees, covered under the RLA, are not covered under the Railway Unemployment Insurance Act ("RUIA") (AFL-CIO 26-27).

The exclusion of airline employees from the RUIA was the consequence of the decision to take "advantage" of the "economy of administration" which would result in "mak-

[23] For example, the requirement that strikers must be available for and seek other work in order to obtain unemployment compensation is only loosely enforced. Tr. 759-65, A. 396-98. In contrast, strikers have "difficulty applying for and being certified for food stamps." H. Rep. 95-464, 95th Cong., 1st Sess. 129 (1977). As for welfare payments, the strike which gave rise to this case showed that resort to them was minimal (less than 1,000 employees in the CWA strike) compared with the almost universal collection of unemployment compensation by the strikers (more than 33,000 received benefits) (see our main brief p. 12).

ing the coverage [under RUIA] the same as the Railroad Retirement Act" ("RRA") from which airline employees were earlier omitted.[24] At the time the RRA (the railroad industry's counterpart to the retirement provisions of the Social Security Act) was enacted in 1935, the fledgling airline industry had not yet been brought under the coverage of the RLA.

We believe it appropriate here to reiterate this Court's warning that "all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes." *Chicago & North Western Ry. Co.* v. *United Transportation Union,* 402 U.S. 570, 579 n.11 (1971).

## VI

**The Eleventh Amendment Does Not Bar a Refund of Employer Overpayments From the Unemployment Insurance Fund.**

The District Court's judgment in this case directed prospective declaratory and injunctive relief including an order requiring the readjustment of the Bell Employers' (petitioners herein) experience rating accounts in the Unemployment Insurance Fund ("Fund") (Pet. 20a-21a).

This relief was requested and granted so that in the computation of these employers' current and future unemployment insurance contribution rates they will not continue to be penalized because of the payment of benefits made to the CWA strikers in 1971 and 1972. It requires a bookkeeping adjustment and is prospective in nature.

[24] Hearings on H.R. 10127 Before a Subcomm. on the Railroad Unemployment Ins. Sys. of the House Comm. on Interstate and Foreign Com., 75th Cong., 3d Sess. 30 (1938) (statement of Charles M. Hay, counsel for the legislation's chief proponent).



These forms of relief are not in dispute in this case; nor could they be in light of such cases as *Ex Parte Young,* 209 U.S. 123 (1908), cited with approval in *Edelman* v. *Jordan,* 415 U.S. 651 (1974).

What the State does challenge is the portion of the request for relief which sought a monetary refund on the basis of a readjustment of tax rates in *prior* years. See Complaint 21, ¶5, A. 32-33. This is a claim against the Fund for overpayments in employer contributions resulting from increased employer tax rates assessed against them (commencing in 1972 and continuing thereafter) which, in turn, were directly attributable to the unlawful payments made to strikers and charged against the Bell Employers' experience rating accounts in 1971 and 1972.[25] The overpayments for the New York Telephone Company, alone, amounted to more than $6,000,000 in 1972 and more than $9,000,000 in 1973. Pre-Trial Order ("PTO") 12, ¶35(f), A. 60.[26]

The State argues against the recoupment of overpayments from the Fund (State 50-59). In essence its contention is that, for the purposes of applying the Eleventh Amendment's doctrine of sovereign immunity, monies paid out of the Fund must be considered as state funds and, accordingly, any federal judgment seeking to reach such funds would be prohibited by the Eleventh Amendment.

[25] An employer's contributions to the Fund are computed on the basis of the employer's experience rating which in turn is based on the balance remaining in his individual account at the end of each year after crediting the employer's contributions made during the year and debiting the benefit payments made to the employer's former or present employees during the same year. Thus the fewer benefit payments chargeable to an employer's account, the smaller his contribution rate will be in future years.

[26] Additional overpayments have since been made in 1974, 1975, 1976, 1977 and 1978.

The District Court concluded (Pet. 53a-54a) that this contention is without merit, inasmuch as the record facts[27] established that the Fund (1) exists separate and apart from the State's general funds and treasury,[28] (2) consists *entirely* of unemployment insurance contributions by employers and some federal funds,[29] (3) receives no state funds of any kind and is used solely to pay benefits and to refund employer contributions erroneously or unlawfully collected.[30] The State, moreover, as found by the District Court below, *"has expressly shielded its treasury from any obligations arising out of the payment of unemployment insurance benefits and/or the administration and operation of the fund."* Pet. 54a (emphasis supplied); N.Y. Labor Law §550 (McKinney 1977).[31]

The Court of Appeals did not reach the Eleventh Amendment issue and, accordingly, it was first raised in this Court in the Brief for Respondents (State 2, 50-59).[32]

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[27] These facts were extracted from (a) the *agreed facts* in the Pre-Trial Order, (b) the face of the governing statutes and (c) publications issued by the New York State Department of Labor, a party to these proceedings.

[28] N.Y. Labor Law §§550, 553.

[29] PTO 4, ¶ 11, A. 51-52.

[30] N.Y. Labor Law §§550, 570.

[31] The refund here sought, as required by New York State statute, will be payable out of the Fund itself and not out of the State treasury:

> Any credit or refund of contributions erroneously collected . . . shall be a charge against the unemployment insurance fund. [N.Y. Labor Law §570 subd. 5]

[32] The Eleventh Amendment question presented to the Court of Appeals, as stated in the Bell Employers' brief, was:

> Whether the Eleventh Amendment to the United States Constitution may be used as a shield to bar a refund from the Unemployment Insurance Fund—a fund maintained separate from the state's treasury and financed solely by employer and federal contributions—of overpayments unlawfully required of the employers herein as a consequence of some 49 million dollars in unemployment compensation paid out to strikers during the 1971-1972 strike by the Communications Workers of America against them.



This Court in *Edelman* held that a retroactive award of wrongfully withheld state welfare benefits could not be made by the federal courts since "a suit by private parties seeking to impose liability which must be paid from *public funds in the state treasury* is barred by the Eleventh Amendment." 415 U.S. at 663; emphasis supplied.

Elsewhere in its opinion the Court explains its objections to the award of retroactive payment of welfare benefits in the case before it in these terms:

> The funds to satisfy the award in this case must inevitably come from the *general revenues of the State of Illinois* . . . . [415 U.S. at 665; emphasis supplied]

And, at 415 U.S. at 677, the Court sums up:

> Though a §1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award *which requires the payment of funds from the state treasury.* [Emphasis supplied; citations omitted][33]

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[33] The State's assertion in its brief (pp. 51-52) that *Edelman's* use of terms such as "general revenues of the State" and "state treasury" was merely "generic" seeks to obscure a distinction found to be crucial in post-*Edelman* decisions, including several cited by the State. Such decisions have turned on the factual issue of whether the state's treasury has been so shielded that legislative appropriations from the state's general revenues would not be required. *See, e.g., Bowen* v. *Hackett,* 387 F. Supp. 1212 (D.R.I. 1975); *Schiff* v. *Williams,* 519 F.2d 257, 262 (5th Cir. 1975); *Miller-Davis Co.* v. *Illinois State Toll Highway Authority,* 567 F.2d 323, 327 (7th Cir. 1977). It has been only upon a finding that such general revenues would be involved that the Eleventh

Thus the Court's opinion in *Edelman* emphasizes that it is only an award of retroactive damages against a state treasury which is barred by the Eleventh Amendment. But an award of retroactive damages against an independent state-administered fund, existing separate and apart from the state treasury, for liabilities from which the state, by statute, has shielded its treasury, is totally proper under the Eleventh Amendment.

As suggested by the *Edelman* opinion and supported by the entire body of law on the subject, the crucial factors in determining the Eleventh Amendment immunity of public authorities or independent funds, such as the Unemployment Insurance Fund here involved, are (1) whether their assets are exclusively their own and (2) whether the state's treasury or general funds have been insulated against monetary liability. These were the primary factors relied on by the federal district court in Rhode Island in a post-*Edelman* decision holding that an award of retroactive damages against that state's unemployment insurance fund and its temporary disability insurance fund is not barred by the Eleventh Amendment. *Bowen* v. *Hackett*, 387 F. Supp. 1212 (D.R.I. 1975).

*Bowen* involved a challenge to those provisions of the Rhode Island Unemployment Insurance Act and Temporary Disability Insurance Act which "routinely" provided for children's dependency allowances to unemployed males while requiring females to prove dependency to the satisfaction of the Director of the Rhode Island Department

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Amendment has barred recovery. *See, e.g., Fitzpatrick* v. *Bitzer*, 519 F.2d 559 (2d Cir. 1975), *rev'd in part on other grounds*, 427 U.S. 445 (1976); *Trotman* v. *Palisades Interstate Park Comm'n*, 557 F.2d 35, 38 (2d Cir. 1977); *Jagnandan* v. *Giles*, 538 F.2d 1166, 1176 (5th Cir. 1976); *Wade* v. *Mississippi Co-op Extension Servs.*, 424 F. Supp. 1242 (N.D. Miss. 1976).



of Employment Security. The challenged provisions were declared unconstitutional and the court was called upon to decide the question of back payments in light of the Supreme Court's decision in *Edelman*. The controlling issue after *Edelman*, according to Chief Judge Pettine, was "whether a judgment having a direct impact on these funds [the Employment Security Fund, Rhode Island's counterpart of the New York Unemployment Insurance Fund, and the Temporary Disability Insurance Fund] constitutes a suit against the state, *i.e.*, to be paid 'from public funds in the state treasury', in the context of the Eleventh Amendment." 387 F. Supp. at 1220.

In concluding that such a judgment against the funds was not barred by the Eleventh Amendment, Chief Judge Pettine gave the following rationale:

> The mere fact that a particular agency or instrumentality was created by the state legislature and performs certain governmental functions is not dispositive of this [Eleventh Amendment] issue.
>
> *There has developed a clear line of judicial authority which has held that if the legislature has intentionally insulated the treasury of the state from any liabilities that a particular financially self-sustaining instrumentality might incur, that instrumentality does not constitute the 'alter ego' of the State, and suit against such a body or its officers is not barred by the Eleventh Amendment.* . . . By analogy, these cases are persuasive authority that the *funds in question herein are not 'public funds in the state treasury' for Eleventh Amendment purposes.* [387 F. Supp. at 1220; emphasis added; citations omitted]

The pertinent facts as to the New York State Unemployment Insurance Fund and program (as found below) are indistinguishable from those in *Bowen*[34] and the rule of law therein laid down is fully applicable here.

The *Bowen* opinion is especially significant here not only because it is the only reported case which deals with the issue of the sovereign immunity under the Eleventh Amendment of a state's unemployment insurance fund but also because it has been cited with apparent approval and the analysis it employed has been adopted by the Second Circuit in *Fitzpatrick* v. *Bitzer,* 519 F.2d 559 (1975), *rev'd in part on other grounds,* 427 U.S. 445 (1976), by the Fifth Circuit in *Houston Welfare Rights Organization, Inc.* v. *Vowell,* 555 F.2d 1219, 1227 (1977), *pet. for cert. granted sub nom. Chapman* v. *Houston Welfare Rights Organization,* 46 U.S.L.W. 3526 (No. 77-719) (argued Oct. 2, 1978), and by the Ninth Circuit in *Hutchison* v. *Lake Oswego School Dist. No. 7,* 519 F.2d 961, 966-67 (1975), *cert. denied,* 429 U.S. 1037 (1977).

In *Fitzpatrick* the Second Circuit reasoned that in disposing of an Eleventh Amendment claim, "[t]he most important factor, of course, is whether, in the event plaintiff prevails, judgment will have to be paid out of the state treasury." 519 F.2d at 564. The *Bowen* case was distinguished because there the state had no legal duty to replenish the fund if it should become depleted or to pay a judgment against the fund, whereas in *Fitzpatrick,* the state was required to appropriate funds and to pay at least 75% of the total retirement payments there involved. Accordingly, said the court, "[a] judgment against the fund would thus automatically increase the obligations of the general state treasury and amount to a judgment against the state." 519 F.2d at 565 (footnote omitted).

[34] The State's discussion at pages 57-58 of its brief conveys an erroneous and misleading impression that under certain circumstances the Unemployment Insurance Fund in New York might be the beneficiary of appropriations by the State legislature. But the statutory provision on which it relies does not deal with the Unemployment Insurance Fund out of which any recoupment here would be payable. Instead, it deals with the Unemployment Administration Fund, which is separate and distinct from the former. The Administration Fund is used solely "for the proper and efficient administration" of the unemployment insurance system and not for the payment of benefits or for the refund of overpayments of employer contributions. See New York Labor Law §551(1).



This Court, in affirming in part and reversing in part the decision of the Second Circuit in *Fitzpatrick,* held that the Eleventh Amendment did not bar an award under Title VII of the Civil Rights Act of 1964, as amended, of retroactive retirement benefits since the Eleventh Amendment's bar is limited by the Fourteenth Amendment, under which Congress enacted Title VII. The Court's analysis in *Fitzpatrick* (which "begins where *Edelman* ended," 427 U.S. at 452), leaves undisturbed and, indeed, reiterates and re-confirms that its earlier *Edelman* decision was predicated on the finding that the damage award there sought was "payable to a private party from the *state treasury.*" *Ibid.* (emphasis supplied).

The Fifth Circuit in *Houston,* after noting that the state unemployment insurance fund in *Bowen* was "financed solely by employers' contributions," proceeded to distinguish *Bowen* from the case before it in the following language:

> In our case, however, the separate funds created for public welfare programs are only a matter of bookkeeping convenience: they are still funded by the state so that any award would resemble too closely a money judgment against the state itself. [555 F.2d at 1227]

In *Hutchison,* the Ninth Circuit quoted from and closely followed the rationale of the *Bowen* decision. It concluded that there was no Eleventh Amendment immunity in that case because the state treasury was shielded from ultimate liability.

These cases do not stand alone for, like them, the great weight of authority reveals that sovereign immunity is no bar to jurisdiction where the state treasury is protected from liability.[35] And, conversely, immunity is consistently found where the state treasury is actually or potentially exposed to liability under awards against public authorities or funds.[36]

In light of these authorities and of New York's unemployment compensation legislative scheme, the State cannot be heard to urge that the employers herein should be denied an effective remedy in federal court on the basis of the Eleventh Amendment.[37]

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[35] *Forman* v. *Community Servs., Inc.*, 500 F.2d 1246, 1256 (2d Cir. 1974), *rev'd on other grounds sub nom. United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837 (1975) (see dissenting opinion agreeing with Second Circuit on Eleventh Amendment issue, *id.* at 866-67 n.6); *Doris Trading Corp.* v. *SS Union Enterprise,* 406 F. Supp. 1093, 1096 (S.D.N.Y. 1976); *Raymond Int'l, Inc.* v. *M/T Dalzelleagle,* 336 F. Supp. 679, 681-82 (S.D.N.Y. 1971); *Idaho Potato Comm'n* v. *Washington Potato Comm'n,* 410 F. Supp. 171, 176 (D. Idaho 1975); *Dyson* v. *Lavery,* 417 F. Supp. 103, 108-09 (E.D. Va. 1976); *Matter of Dormitory Authority of the State of New York,* 18 N.Y. 2d 114 (1966).

[36] This was the rationale for the Second Circuit's finding of immunity in *Rothstein* v. *Wyman,* 467 F.2d 226 (1972), *cert. denied,* 411 U.S. 921 (1973). *See also Charles Simkin & Sons, Inc.* v. *State U. Constr. Fund,* 352 F. Supp. 177 (S.D.N.Y.), *aff'd,* 486 F.2d 1393 (2d Cir. 1973).

[37] The cases relied upon by the State (pp. 55-58) in its Eleventh Amendment argument neither support nor point to a different conclusion. Thus, *Ford Motor Co.* clearly involves the refund of taxes from the *state treasury,* a situation not here involved. And both *Wade* and *Jagnandan* involved a fund consisting of monies "commingled" with legislatively-appropriated monies and "taken into account by the state legislature in determining . . . [future] appropriations." *Wade,* 424 F. Supp. at 1257. As for the State's reliance upon the *Moss Planing Mill, Gullet Gin Co.* and *Carmichael* cases, in none of them was the court presented with an Eleventh Amendment issue (State 56, 59).

[38] This would embrace the District Court's resolution of the Eleventh Amendment issue.



## CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed and that the judgment of the District Court (Pet. 19a-22a) should be reinstated in all respects.[38]

Dated: New York, New York
October 12, 1978

Respectfully submitted,

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MOTION FILED
JUN 10 1978

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-961**

NEW YORK TELEPHONE COMPANY, et. al., *Petitioners*

v.

NEW YORK STATE DEPARTMENT OF LABOR, et. al., *Respondents*

**On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## MOTION FOR LEAVE TO FILE AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* ON BEHALF OF CENTER ON NATIONAL LABOR POLICY

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IN THE

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v.

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**On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## MOTION OF *AMICUS CURIAE* CENTER ON NATIONAL LABOR POLICY FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE POSITION OF NEW YORK TELEPHONE COMPANY

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Center on National Labor Policy hereby respectfully moves pursuant to this Court's Rule 42 for leave to file its brief *amicus curiae* in support of the position of New York Telephone Company. Consent was sought from all parties but was not granted. All of these documents have been filed with the Clerk.

The accompanying brief urges this Court to reverse the holding of the United States Court of Appeals in *New York Telephone Company, et al.* v. *New York State Department of Labor, et. al.*, No. 77-961.

Center on National Labor Policy is a national non-profit, non-partisan organization, chartered as a public interest legal foundation to engage in national litigation in matters affecting the public interest. Among its objectives, the Center is concerned about the impact of pressure groups on the civil rights of the public, consumers, taxpayers, and workers. Private pressure groups, such as organized labor groups, have a history of significant impact on the rights of the public, consumers, taxpayers, and workers. As this Court recognized in *Connell Construction, Co., Inc.* v. *Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616, 625 (1975), union pressure "could result in significant adverse effects on the market and on consumers. . . ." When organized labor pressure is supported by a state government policy, as in the case at bar, significant questions are raised concerning the civil rights of other affected parties—the public, consumers, taxpayers, and workers.

The Center, as a public interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to collective rights of pressure groups such as labor unions. Where state policy gives an advantage to a private association engaged in coercive activity through payment of monetary benefits, the state is answerable for the impact on the rights of individuals.

Because Center on National Labor Policy can bring to this case a diverse perspective not presently represented, the Center's participation can assist the Court in obtaining full consideration of public interest issues.



Accordingly, Center on National Labor Policy respectfully requests leave to file the annexed brief *amicus curiae.*

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IN THE

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**On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## BRIEF OF CENTER ON NATIONAL LABOR POLICY AS *AMICUS CURIAE*

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### INTEREST OF *AMICUS*

Center on National Labor Policy is a national non-profit, non-partisan organization, chartered as a public interest legal foundation to engage in national litigation in matters affecting the public interest. Among its objectives, the Center is concerned about the impact of pressure groups on the civil rights of the public, consumers, taxpayers, and workers.

When organized labor pressure is supported by a state policy of benefits to pressure group members, significant constitutional questions are raised concern-

ing the individual rights of other affected parties. The Center, as a public interest organization, believes that individual rights of consumers, taxpayers, workers, and public citizens should be paramount to the collective privileges of pressure groups such as labor unions. Where state action undergirds the coercive power of such groups, the impact on the public interest may be substantial. Consequently, the Center's concerns about this impact are significant.

Further background and interests of *amicus* have been detailed in the preceding motion for leave to file this brief.

## INTRODUCTION

Some labor union members elected not to work for their employer the New York Telephone Company for approximately seven months in 1971 and 1972. Pursuant to New York state law, the state gave these non-working unemployed union members monetary benefits amounting to approximately $49 million.

The intentions of Congress in requiring government neutrality in national labor policy contemplated not only a balancing of power, but also the basic constitutional institutions protecting the right to contract for employment.

## ARGUMENT

### State Monetary Benefits to Persons Who Elect Not to Work Is a State Intrusion Into the Employment Contract Prohibited by the Contract Clause Because It Is Adverse to the Public Interest.

States may not pass any "Law impairing the Obligation of Contracts. . . ." U.S. Const. art. I, § 10, cl. 1. Contract obligations may not be impaired by state laws which would favor one party by either benefiting one



party or burdening one party. Of course, the contractual interference referred to here is a prospective chilling of the employment contract. But prospective contract impairment is not encompassed by the existing view of this Court. *Ogden* v. *Saunders,* 25 U.S. [12 Wheat.] 213, 359. Nevertheless, when examined with the Ex Post Facto Clauses, more recent scholarly research makes clear that the Contract Clause applies to all laws impairing the obligation of contracts, "whether previously formed *or not.*" CROSSKEY, POLITICS AND THE CONSTITUTION 352 (1953). Indeed, the constitutional history and the obvious relationship between the Contract Clause and the Commerce Clause evidenced a clear intention of the framers to guarantee commercial freedom by vesting complete commercial power in the national government in order to preempt state impairments such as is presented in the case at bar. Crosskey, 355-60.

However, the Contract Clause has been held not to interfere with a state in its legitimate exercise of economic regulation in "the vital interests of its people." *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398, 434 (1934).

Yet the Contract Clause has vitality. The contract right protects the public, as well as the individual. The permitting of some state economic tinkering contemplates, not just the possible benefit, but the potential harm to economic processes by an impairment of the contract right. In other words, a general public good achieved with minimal interference with individual rights is constitutional.

However, drastic altering of economic structure to the detriment of traditional individual property rights

is not permissible. For example, a basic procedural change in the law of collateral security was characterized by Justice Cardozo as "an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security." *Worthen Co.* v. *Kavanaugh,* 295 U.S. 56, 62 (1935).

The case at bar is analogous. The employment bargain, and, indeed any contract, is a *quid pro quo*—compensation for work. Here the state intrudes upon the bargain and offers something for nothing—compensation for no work. Where mutual agreement was previously encouraged by the certainty of contract, the state's intrusion obfuscates the consideration for the employment contract and renders amorphous the consistency of the *quid pro quo.* Clearly, this is an unhealthy basic procedural change which strikes at the heart of the employment contract. Like *Worthen Co.,* the situation at bar represents an oppressive destruction of the incidents that have traditionally made an employment contract an attractive and valuable economic act. And as in *Worthen Co.,* the state's economic intrusion is no mere tinkering but a fundamental and unconstitutional alteration of the economic process.

Notwithstanding the foregoing defect, the state's action is also impermissible if against the public interest. While this Court has found the Contract Clause undisturbed by some state regulation in "the vital interests of its people," *Home Building & Loan Ass'n.* v. *Blaisdell,* 290 U.S. 398, 434 (1934), activity counter to the broad public interest is prohibited. Allowance for fine-tuning was never intended to encourage wholesale trampling of citizen rights. Thus where a state's action undermined the certainty of land sales, this Court held the law void as an assault in "the rights of . . . purchaser[s]. . . ." *Wood* v. *Lovett,* 313 U.S. 362, 369 (1941).



In examining the case at bar the adverse impact this state's action has on the public must also be considered. Actions affecting organized labor power cannot be considered in a vacuum. As this Court has previously recognized, labor union power "could result in significant adverse effects on the market and on consumers. . . ." *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616, 625 (1975).

In the instant case, $49 million in public funds was transferred to union members voluntarily out of work. These voluntary non-workers produced absolutely nothing in exchange for the $49 million. The $49 million represents money earned by other citizens, taxpayers, companies, and proprietors. Thus, $49 million of the earnings and profits of people who were working was transferred to people who voluntarily were not working. The magnitude and manifest unfairness of the transfer of that money from productive citizens to those voluntarily unproductive is sufficiently adverse to the public interest to invoke the safeguards of the Contract Clause.

It is clearly no less an affront to the public interest to force the New York Telephone Company to pay $40 million. The company is a human economic structure —owned, operated, and patronized by people. Ultimately, any burden of the company becomes the burden of those people. And the public has witnessed enough rate increase hearings to know that the $40 million will still be paid by the consuming public. In summary, some economic fine-tuning in the public interest may not be offensive to the Contract Clause. But state med-

dling in the employment contract which shifts economic rights to the detriment of the broad public interest cannot escape the bar of the Contract Clause.

Consequently, the state's intrusion into the employment contract violates the Contract Clause both because it is a radical alteration of the traditional economic structure and because it is counter to the broad public interest.

## CONCLUSION

This court is seldom called upon to invoke the prohibition of the Contract Clause. And clearly, this Court has come a long way down the road towards abstention in commercial matters. Yet abstention here would cause an absurd result which would not justify adherence to an old, erroneous interpretation of the Contract Clause as "retrospective only". Indeed, the patently unfair consequences of the state statute awakens this dormant guardian of freedom. Here the state statute would topple the Constitutional foundations upon which individual rights depend and flout the public interest.

Because the history of chaos from governmental interference in the commercial arena will point up the error of ignoring the intention of the framers, now is the time for a reevaluation of the Court's treatment of the Contract Clause protections. The public interest demands an across the board rule preventing the heavy hand of the state from thrusting itself into the delicate mechanism of the employment contract. Consequently, Center on National Labor Policy respectfully requests that this Court strike down the offending law as unconstitutional.



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Supreme Court, U. S.
FILED
JUN 12 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-961**

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

*v.*

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

*Respondents.*

## BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*

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NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),

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*v.*

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*Respondents.*

## BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE

This brief *amicus curiae,* in support of the petitioners, New York Telephone Company, Western Electric Company, American Telephone & Telegraph Company, Long Lines Department, and Empire City Subway Company (Limited), is filed by the Chamber of Commerce of the United States, with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

## Interest of the *Amicus Curiae*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce, and trade and professional associations, and a direct business membership in excess of 65,000. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests, before the courts, the U. S. Congress, the Executive Branch and independent regulatory agencies of the Federal Government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[1]

The question presented in the instant case is of vital concern to the Chamber and its members. Essentially, the case presents the question whether states may intrude upon the national labor policy of government neutrality

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[1] E.g., *Buffalo Forge* v. *Steelworkers*, 428 U.S. 397 (1976); *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union 100*, 421 U.S. 616 (1975); *Gateway Coal Company* v. *United Mine Workers of America, et al.*, 414 U.S. 268 (1974); *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville, etc., et al.*, 417 U.S. 12 (1974); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkel, et al.*; 416 U.S. 115 (1974); *N.L.R.B.* v. *Bell Aerospace Company Division of Textron Inc.*, 416 U.S. 267 (1974); *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B.* v. *Granite State Joint Board*, 490 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 517 (1971); *N.L.R.B.* v. *The Boeing Company, et al.*, 91 S.Ct. 1952 (1973).



in labor disputes and the process of collective bargaining, by granting unemployment compensation benefits to strikers at the expense of their struck employer. Inherent in that question is the broader issue of whether, under the Supremacy Clause of the United States Constitution and the doctrine of pre-emption, as enunciated by this Court, states may compel an employer to financially assist a strike by his own employees, and thus tip the delicate economic balance so essential to effective collective bargaining and the resolution of labor disputes. Moreover, Chamber members contribute a very significant portion of the monies which constitute the Unemployment Insurance Funds of the various states. The Chamber, therefore, has a vital and continuing interest in the outcome of this litigation.

## Summary of Argument

The issue posed is whether the national labor policy of free collective bargaining pre-empts a state statute which permits striking employees to receive unemployment compensation, a benefit extracted from the struck employer. The Second Circuit acknowledged a demonstrable conflict between the New York scheme and federal labor policy, but held that Congress had evidenced a tolerance of that conflict, thus, in its view, sparing the state statute from pre-emptive demise. The lower court based its conclusion upon a scattering of evidence, outside the context of the National Labor Relations Act.

The amicus argument, in opposition to that conclusion, is in three parts. First, we establish the necessary perspective, demonstrating the premise and basic purpose of the Act, namely, that the organized worker, through the mechanism of collective bargaining, should be and is granted equal say with management in how the product of the labor-capital joint venture will be distributed.

The development of that mechanism is traced, showing judicial recognition of the need for balance in the self-help measures available to the contenders. The process, in original concept, and as applied today, contemplates a distribution of power and/or resources in direct relation to economic strength or weakness, tested within a framework of mutual risk. In the second point, we begin with the lower court's finding of conflict between New York's payment of unemployment compensation to strikers and the federal collective bargaining policy. We argue that this conflict is a most destructive intrusion compared to state efforts to insure responsible union leadership, an effort earlier pre-empted by this Court, though later pursued by Congress to preserve the vitality of the labor movement. Decisions of this Court, emphatically interdicting a variety of state action, are reviewed to illustrate the primacy of the federal policy and its pre-emptive effect absent a clear, contrary demonstration by Congress. The Act itself is examined for evidence of congressional intention to pre-empt state action bearing on the bargaining relationship. That examination reveals that (a) Congress amended the Act to prohibit government influence on the substantive terms of the parties' collective bargain, (b) Congress amended the Act to provide that states were not pre-empted in their ability to regulate union security arrangements, and (c) when Congress amended the Act to permit bargaining for "legal services" trust funds, it imposed the condition that employer contributions could not be used to the prejudice of the labor-management relationship, thus exhibiting a congressional sensitivity totally at odds with the philosophy of the challenged statute. The factors relied upon by the Second Circuit do not manifest an intention by Congress to permit the substantial state intrusion found to exist here. Welfare programs which may benefit a needy striker and the payment of unemployment compensation



to striking employees of a "carrier", factors relied on by the court, are shown to offer no support for the court's conclusion and in fact are shown to reinforce the opposite conclusion. The fact that Congress has not prohibited the state action now challenged and the fact that there were efforts in that direction, begun but never fully developed, are shown to be equally unpersuasive evidence.

The final argument of the amicus demonstrates the damaging consequences which flow from this form of state intrusion. The state political process can manipulate the bargaining process and the mischief has natural application to the public sector. The economic reality of unemployment compensation to a striker is graphically shown in terms of a hypothetical New York wage earner who is on strike. Finally, attention is called to interstate impact on bargaining when certain states pay this form of assistance to strikers.

## POINT I

### The national labor policy of free collective bargaining is rooted in economic realities and requires mutuality of risk.

The pre-emption issue posed requires, first, a focus on the more elemental aspects of federal labor policy, its genesis and underlying premises. That policy, articulated principally in the National Labor Relations Act of 1935, was born largely of the belief that the unorganized worker was economically disadvantaged and that by advancing him to a position of equality, there would be a more equitable distribution of the fruits of his labor and his employer's capital. *II Leg. Hist., National Labor Relations Act, 1935,* 2300-2303. Accordingly, the Act espouses the dual policies of encouraging the "practice and procedure of collective bargaining" and of protecting the right to

organize. 49 Stat. 449, 29 U.S.C. 151. The Act appears to rest on inconsistent principles: (1) bargaining will reduce national unrest, and (2) effective bargaining requires the ability to disrupt. The process of bargaining, within the framework of the Act, is simply a means of harnessing strife so that when it occurs it is directed at a legitimate objective, i.e., a different distribution of power and/or resources within the rubric of wages, hours and other terms and conditions of employment. Whether there be strife or not, the process intends that the respective positions of the contenders will be rejected or entertained on the basis of perceived or demonstrated relative strength or weakness. It is a primitive rite built on economic reality.

> "The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties." *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 288 (1972).

The strike is the ultimate demonstration of that equality which Congress intended through the "practice and procedure" of collective bargaining. It is "part and parcel of the system", *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 489 (1960), and has been circumspectly treated by courts and Congress alike.

> "This repeated solicitude [by Congress] for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.



> While Congress has from time to time revamped and redirected national labor policy, its concern for the integrity of the strike weapon has remained constant . . . preserving the positive command of §13 that the right to strike is to be given a generous interpretation within the scope of the labor act. The courts have likewise repeatedly recognized and effectuated the strong interest of labor policy in the legitimate use of the strike." *NLRB* v. *Erie Resistor Corporation*, 373 U.S. 221, 233-234 (1963) (footnote omitted).

It has been the function, partly of the N.L.R.B., but in all cases ultimately of this Court, to assure the continued institutional equilibrium of the bargaining process ordained by Congress. Thus, *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 375 (1938) affirmed the employer's right to continue operations and to hire permanent replacements for economic strikers. Yet, an employer's grant of superseniority to striker replacements, even for legitimate business reasons, was seen as drastically shifting the center of gravity, with "devastating consequences" on the right to strike. *NLRB* v. *Erie Resistor Corporation, supra*, 375 U.S. 235. The union's principal weapon of primary, total strike for economic gain can be preempted by an employer's lockout, not only in defense of its economic position, but also as a pressure device to obtain favorable terms from the union. *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1965). Similarly, a multi-employer association may attempt to neutralize a union's selective strike against one member company by locking out employees of all non-struck member companies. *NLRB* v. *Brown*, 380 U.S. 378 (1965). The union weapon of "partial strike", legitimatized in *Insurance Agents, supra*, may be countered by employer disciplinary action or lockout. *Lodge 76 IAM* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

Of course, it was not always thus. The partial strike has been the subject of noteworthy judicial treatment. When the Court, in the *Briggs-Stratton* decision,[2] sustained a state injunction against a union's partial strike, it had assumed that "management . . . would be disabled from any kind of self-help to cope with these coercive tactics of the union" and could not "take any steps to resist or combat them without incurring the sanctions of the Act." 336 U.S. at 264. These assumptions were later invalidated by *Insurance Agents* and *American Ship Building Co.,* which recognized the employer's right to respond by discipline or lockout. In overruling *Briggs-Stratton,* the *Lodge 76* Court noted this restoration of self-help to the employer. It concluded that Wisconsin's denial to the union of a legitimate instrument of self-help would "frustrate effective implementation of the Act's processes". —— U.S. ——, 96 S. Ct. 2556-2557.

These benchmark decisions were concerned with maintaining or restoring self-help capabilities. The effectiveness of the device chosen will depend upon the staying power of the user and the extent to which the risk entailed becomes a reality. Bargaining works not only because the self-help devices permitted create risk of economic harm, but as well because for each device there is a counter-measure which presents its own risk. That is the natural outgrowth of the original concept designed to determine the share or division of the joint product of labor and capital. "[T]he essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory." *II Leg. Hist., National Labor Relations Act, 1935,* 2312. The obvious prerequisite to that essential freedom is mutuality of risk and access to substantially equivalent self-help measures capable of testing economic strength or exposing economic weakness.

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[2] *United Automobile Workers* v. *Wisconsin Employment Relations Board,* 336 U.S. 245 (1949).



## POINT II

**State intrusion into the core area of the bargaining process cannot be justified on the basis of congressional acquiescence.**

The pre-emption test applicable here is whether Congress intended, within the framework of its national labor policy, to permit state payment to strikers of unemployment compensation benefits which are charged to the struck employer. The answer to that question ultimately depends upon whether the application of state law would operate to frustrate the purpose of the federal labor policy. *Local 20 Teamsters Union* v. *Morton,* 377 U.S. 252 (1964); *Lodge 76 IAM, supra.* The policy is one of free collective bargaining, through self-help if necessary, with economic power realities determining the result. The purpose of that policy is the settlement of disputes between two parties each legally recognized as having an equal say in the distribution of the fruits of their joint productive effort. In the instant case, the district court held the state payment of unemployment benefits to strikers to be in conflict with federal labor policy in that it is state intervention on behalf of strikers and causes an employer to finance its own strike. The court regarded it not only a truism, but a verifiable fact, amply supported by the record, that the expectation or receipt of substantial, weekly, tax free payments to strikers is a substantial factor in the decision to initiate a strike or in the maintenance of it. 434 F.Supp. 813-814, 824. The Court of Appeals implicitly accepted the lower court's factual determinations and *conceded* that the state statute was in conflict with federal labor policy. 566 F.2d 388, 395. The Second Circuit did not dwell on the particulars of the conflict or on the policy involved. It acknowledged the general requirement of state neutrality

and "the otherwise broad preemptive scope of the federal labor laws", but nonetheless found the striker payments, here, permissible. 566 F.2d 395.

Conflict may, of course, be manifested in various ways. *Hill* v. *State of Florida*, 325 U.S. 538 (1945) held Florida's licensing and disclosure provisions, directed at unions and their agents, and enforceable by sanctions, to be repugnant to "the full freedom" guaranteed by the National Labor Relations Act to employees in the selection of their bargaining representatives. "The collective bargaining which Congress has authorized contemplates two parties free to bargain, and cannot thus be frustrated by state legislation." 325 U.S. 542. There is nothing inherently prejudicial in requiring a union to disclose its name, address, officers, etc., or in attempting to insure that convicted felons not be permitted to operate as union business agents, which were the features of the challenged Florida statute. Indeed, in 1959, Congress imposed essentially the same requirements on unions when it enacted the Labor-Management Reporting and Disclosure Act, 73 Stat. 519, 29 U.S.C. 401, 431 and 504. The overriding concern in both instances was to insure that union representatives, in whom the law vests substantial power as equals in collective bargaining, should first be responsible participants. If a state may not make such judgments and screen out the irresponsible participants, why should a state be able to intervene in the core area of the process and disrupt the interplay of economic forces? Such licensing and disclosure requirements, by whomever imposed, are not directed at the heart of the process by which industrial disputes are to be resolved. It is surely otherwise with a state statute which transfers employer resources to those who have withheld their labor in the hope of coercing from that very employer a larger share. It is relevant to note in this regard that, under federal labor law, a struck employer has the right to with-



hold from striking employees not only wages, but indirect compensation as well, e.g., insurance benefits. *Philip Carey Manufacturing Co.*, 140 NLRB 1103 (1963), enf. 331 F.2d 720 (6th Cir. 1964). Thus, the New York statute, in effect, compels an employer to do that which the federal statute permits him to avoid. This is frustration of the federal policy at the most fundamental level. It replaces risk with certainty, it removes the "self" from self-help so far as the union is concerned, and it confronts the employer with a weapon for which there is no counter-measure except to make those concessions dictated by the artificially rearranged economic power realities. Relatively speaking, it is "no-risk" bargaining; it is virtually "free" collective bargaining for the union, but very costly for the employer. His role shifts from self-help to adversary-help. We dwell on this not because the asserted conflict is in serious dispute (we doubt that it could be), but because the degree of conflict is so substantial that such an intrusion into the bargaining process should not be allowed in the absence of unmistakable congressional intent to permit it.

A diligent review of the authoritative decisions relevant to this branch of the pre-emption doctrine leaves no doubt that if the New York statute is to be spared, that result must flow from a clear showing that Congress intended that the states be free to compromise the very essence of the collective bargaining process. In the strongest possible language, this Court has interdicted: (1) state action which intruded upon the mechanics of bargaining, *Lodge 76 IAM, supra,* prohibiting the state injunction of a partial strike; (2) state action which intruded upon substantive terms bargained for in compliance with the federal duty to negotiate in good faith, *Local 24 Teamsters Union* v. *Oliver,* 358 U.S. 283 (1959), prohibiting application of a state's anti-trust statute to

invalidate a collectively bargained wage agreement;[3] and (3) state action, in the form of an unemployment compensation determination, which impeded the exercise of rights guaranteed by the Act, *Nash* v. *Florida Industrial Commission,* 389 U.S. 235 (1967), prohibiting a state determination on eligibility for unemployment compensation to undermine a right recognized by the Act. Each of these cases has direct application here to a state statute which does violence to the mechanics of bargaining, to the substantive terms which are to be collectively bargained, and to the employer's right under the Act to freely decide what proposals are satisfactory to it (*H. K. Porter* v. *NLRB,* 397 U.S. 99 (1970)), uncoerced by state determinations on eligibility for unemployment compensation.

Everything that has been said to this point regarding judicial protection of federal labor policy was reduced by the Second Circuit to the simple hornbook axiom recognizing the "broad pre-emptive scope of federal labor laws". A similar amount of discourse was expended on the Act itself: "[the Act] makes no mention of unemployment compensation." True enough, but that is not the end of it if one is searching for evidence of intention. Section 8(d) of the Act, 29 U.S.C. 158(d), a product of the 1947 Taft-Hartley Amendments, not only reaffirms the duty to bargain, but also crystalizes the congressional intention that the parties are free to bargain out their differences without regulation by the National Labor Relations Board. *Local 24 Teamsters* v. *Oliver, supra,* 358 U.S. 295; *NLRB* v. *Insurance Agents, supra,* 361 U.S. 488.

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[3] Cf. *Malone* v. *White Motor Corp.,* —— U.S.L.W. —— (April 3, 1978, No. 76-1184) where this Court declined to pre-empt a state statute which regulated certain aspects of pension plans. It reasoned that Congress, by express terms, had clearly intended the states to undertake the very kind of regulation challenged in that decision.



The same 1947 amendments expressed only one exception to that freedom to bargain. By Section 14(b), Congress has explicitly permitted state interference with the bargaining process to the extent that compulsory union membership—the economic lifeblood of unions and an otherwise required subject of bargaining—may be barred by state action. In setting the limits of federal pre-emption, 29 U.S.C. 164(b) provides:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

A pointed demonstration of congressional sensitivity to the bargaining relationship is found in a 1973 amendment, and its legislative history, regarding the propriety of bargaining for jointly administered trust funds used to defray the costs of legal services for employees. The amendment responded to the congressional observation that routine legal services were frequently beyond the reach of employee purchasing power. Before its enactment, however, concern was expressed by Senator Taft and others that employer contributions not be used to finance "offensive legal actions bearing directly on labor-management relations". The Senate Report was in accord:

> "Specifically, such funds should not only be prohibited from use for litigation, but also from counseling and legal advice with respect to disputes or proceedings in the labor-management context." S. Rep. No. 93-139, 93d Cong., 1st Sess. (1973), U.S. Code Cong. & Admin. News 2007, 2010.

As enacted, the amendment prohibits the use of trust funds for legal services "to initiate *any* proceeding" against the contributing employer, the bargaining representative of the covered employees, or for that matter against any other employer or union "in any matter arising under the National Labor Relations Act, as amended, or this Act". 29 U.S.C. 186(c)(8). Congress authorized only one exception to the all inclusive term "any proceeding", i.e., a workman's compensation case. This exception was made "because the cost of such representation is deducted from awards in most states, and represents a major item of legal expense to employees generally". Noting that such proceedings are only "nominally against employers", the Senate Report further observed: "[O]f course, nothing in this Bill requires an employer to agree to the use of a trust fund for such [workman's compensation] purposes". U.S. Code Cong. & Admin. News 2007. Even this exception, therefore, is one that the employer has the right to resist in free collective bargaining. Notice that services cannot even be furnished in connection with the prosecution of *an unemployment compensation claim*. What this treatment clearly reflects is congressional determination that the fruits of the bargaining process (assuming the parties in fact agree to create such a trust fund) shall not be used to undermine that process and victimize the employer with his own contributions. Because, in any event, an employer would only contribute such funds if he voluntarily agreed to do so, this congressional treatment demonstrates an extremely sensitive concern for the integrity of the collective bargaining process and the labor-management relationship. And it is clear from the Senate Report that the protections provided were necessary to the amendment's enactment.

There is an egregious inconsistency between Congress' sensitivity to the use of employer funded, legal trust



funds, voluntarily created, which would support the relatively modest legal necessities of employees, and the Second Circuit's conclusion that the forced transfer of $49,000,000.00 from New York Telephone to the pockets of its striking employees, a transfer which admittedly "alters the balance in the collective bargaining relationship", is the kind of alteration which Congress is willing to tolerate. If such tolerance is perceived, how does that square with the inability of a striking employee to perfect his unemployment compensation claim under a statute like New York's, using trust funded legal services?

The Second Circuit said "Our review of the relevant legislative history discloses no clear pre-emptive intent . . ." 566 F.2d 395. That "review" was confined to a variety of other federal legislation and virtually ignored the history of the one statute under which pre-emption was claimed. The only historical reference to the National Labor Relations Act focused on the Hartley Bill's unsuccessful effort to redefine "employee" to exclude strikers who accepted unemployment compensation, an example of what Congress failed to do, rather than what it has done. Given the evident fact, derived from that Act, that a most compelling national interest and policy is at stake here, state intrusion may not be permitted absent an affirmative showing that Congress clearly intended to permit compromise of its own policy. *Local 20 Teamsters* v. *Morton, supra; Garner* v. *Teamsters Local 776,* 346 U.S. 458 (1953). There is no such showing. What the Second Circuit relied upon was (a) no express federal prohibition of the challenged state action, (b) unsucceessful efforts to obtain such a prohibition, (c) several federal, social programs which do or can extend welfare benefits to strikers or children of strikers if "need" is demonstrated, (d) federal authorization in The Railroad Unemployment Insurance Act of

1938 to pay unemployment compensation to striking employees of a carrier, 45 U.S.C. 351 et seq., and (e) this Court's refusal to find pre-empted under the Social Security or Federal Unemployment Tax Acts a state's denial of unemployment compensation to one laid off in the ripple effect of a strike.[4]

The absence of a federal prohibition on the state's payment of unemployment compensation to strikers is meaningless. "We must spell out . . . the area [under the N.L.R.A.] in which state action is *still permissible.*" *Garner* v. *Teamsters Local 776,* 346 U.S. at 488. In "the area of labor combat *designed to be free*" silence does not suggest consent to state regulation. *Garner,* at 500 (emphasis added). Efforts which did not succeed in creating a prohibition shed no light on the will of Congress when those efforts were undertaken by those other than Congress and when they stopped far short of congressional action. *Grinnell Corporation* v. *Hackett, et al.,* 475 F.2d 449, 455, 456 (1st Cir. 1973), cert. denied 414 U.S. 858.

Welfare legislation is unrelated to the employment relationship. Judicial notice may be taken that a significant number of full time employees are so situated with family responsibilities that they qualify as "needy" under the several welfare programs. The source of benefit funds, the class benefited and the qualifications for benefit do not directly impact upon the labor-management relationship. Such grants may benefit individual qualifying strikers—in given strikes, none may qualify—but there is no statutory expression which benefits strikers as a class. Eligibility is based upon an assessment of

[4] *Ohio Bureau of Employment Services* v. *Hodory,* 431 U.S. 471 (1977).



"need". The cause of that "need" may be disregarded. General revenues fund such programs; no assessment is made against a particular class. The presence of such welfare programs which may embrace needy strikers and their families buttresses the claim that unemployment compensation may not impinge on collective bargaining. Congress was well aware that genuine "need" might spring from a striker's particular plight as well as from a host of other circumstances, and that need can be accommodated within general welfare programs. Collective bargaining may entail "combat", but it does not imply a license to annihilate an adversary. Conversely, welfare programs may respond to the needy striker, but not by reaching into the pockets of the employer, or by requiring the employer to finance strikers regardless of need.

The Second Circuit points to the Railroad Unemployment Insurance Act of 1938. To mention it is to distinguish it. Because Congress in the first instance (1926) treated "carriers" separately and differently from all other employers, 45 U.S.C. 151 et seq., and because Congress thereafter was moved again to treat them separately and differently by assuring their employees unemployment compensation benefits during periods of strike, this disparity simply reinforces the conclusion that Congress intended different treatment for employees of non-carriers. The strike benefit aspect of this legislation was designed to encourage compliance with the "cooling off" procedures of The Railway Labor Act. *Brotherhood of Railway and Steam Ship Clerks, etc.* v. *Railroad Retirement Board,* 239 F.2d 37, 43 (U.S. App. D. C. 1956).[5]

[5] To resolve the . . . question . . ., two factors control our inquiry. The first is the purpose of Congress in granting to employees of railroads, unlike industrial employees generally, unemployment benefits while on strike . . ." 239 F.2d 41.

Thus, carrier employees who strike in violation of those statutory procedures are denied unemployment compensation. 45 U.S.C. 354(a-2)(iii). But Congress has elected to treat "industrial" employees differently. Those employees of employers subject to the National Labor Relations Act are induced to comply with the notice requirements and the mediation scheme of that Act not by the promise of benefit, but rather by the threat of losing their "employee" status. Thus, Section 8(d), the very section which generates the national policy of collective bargaining, also provides that those who strike in violation of statutory notice requirements forfeit "employee" status. 29 U.S.C. 158(d). The Railroad Unemployment Insurance Act is but one insight into congressional thought in this area. In another statute Congress has forbidden payment of unemployment benefits to strikers in the District of Columbia, an action completely consistent with its Section 8(d) "forfeiture" philosophy. Irrespective of the availability of striker unemployment compensation as under the Railroad Act or nonavailability under the District of Columbia statute, it is beyond question that Congress knows well how to provide for either approach and does so in explicit terms, when it so intends.

Finally, there is the *Hodory* decision. The fact that this Court, in *Hodory,* expressly reserved the labor law pre-emption issue neutralizes, as to the instant case, the Court's pre-emption conclusions under the Social Security and Federal Unemployment Tax Acts.

None of the bases relied upon by the Second Circuit evidence a clear congressional intent to permit the frustration of the bargaining process shown to exist in this record by New York's grant of unemployment compensation to striking employees. Finding no clear intention to pre-empt, instead of looking for evidence of a clear intent to



permit, the Second Circuit has imputed to Congress an acquiescence or tolerance of the state program.

What Congress tolerates is not a proper basis for decision. That observation is dramatically demonstrated by this Court's contrary pre-emption decisions in two cases presenting similar facts, *Briggs-Stratton* and *Lodge 76 IAM, supra.* The former held permissible, as not pre-empted by federal labor policy, state action enjoining concerted employee interference with the employer's production process. The Court reasoned that "Congress designedly left open an area for state control", and (like the Second Circuit in the instant case) it found no evidence that Congress had "clearly manifested an exclusion of the state power sought to be exercised in this case". 336 U.S. 253. Twenty-seven years later, with no expression heard from Congress, the Court in *Lodge 76 IAM* overruled *Briggs-Stratton* and held pre-empted state action enjoining a concerted employee refusal to work overtime. The Court said "There is simply no question that the Act's processes would be frustrated . . . were the State's ruling permitted to stand." The Court found it ". . . clear beyond question that Wisconsin '[entered] into the substantive aspects of the bargaining process to an extent the Congress has not countenanced' [citing *NLRB* v. *Insurance Agents*, 361 U.S. at 495]". 96 S.Ct. 2557. Congressional tolerance is irrelevant.

Given the fact of conflict, conceded by the Second Circuit in the instant case, the claim of pre-emption may not be cavalierly dismissed in light of congressional and judicial concern for the integrity of free collective bargaining. This concern has found expression in numerous decisions of this Court. *Farmer* v. *Carpenters, Local 25* makes clear that state action must be "consistent with effective administration of the federal scheme", —— U.S.——, 97 S.Ct. 1056,

1063 (1977). *Garner* v. *Teamsters Local 776,* often quoted by this Court with approval, declares:

> "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.", 346 U.S. 485, 500 (1953).

## POINT III

**State freedom to compensate strikers at the employer's expense threatens national labor policy on a broad front.**

Allowing states a free rein to legislate in this area can produce many discrepancies, each with its individual impact upon federal labor law. Disqualification periods and compensation rates provide the major areas of discrepancies. The State of New York regards an eight-week disqualification of strikers as the measure of state "neutrality" in labor disputes affecting interstate and intrastate commerce. *New York Telephone, supra,* n.5. In Rhode Island, the measure is seven weeks. A 1978 proposed amendment to the California unemployment compensation statute would provide a maximum five week disqualification for strikers. SB2054. If state legislative judgment is predominant, there is no obstacle to concluding that a more accurate measure of "neutrality" is a three-week or one-week disqualification for strikers.

Most states presently consider that a benefit of one-half the average weekly wage is a justifiable level of compensation in terms of the program's social objectives. But these states are free to increase that ratio, just as the states are free to increase the taxable wage base.



Puerto Rico, for example, levies its tax on 100% of the wages paid, rather than on the first $6,000.00 of wages, which is the base observed by most states.[6]

Accordingly, equality of bargaining power between employer and employee could vary considerably from state to state. A lower disqualification period and higher benefit would more easily crush employer resistance. Unions and strikers could declare open season on an employer's checkbook, one way or the other, through higher settlements or longer strikes. The concept of a national policy where management and labor each has an equal say in the distribution of the fruits of their joint productive effort would be subordinated to the political vagaries within each state.

As an example of what a striking employee earning $230.00 per week working and living in New York City would expect to receive after being on strike eight weeks, we submit the following:

A Married Employee With 4 Dependents, Including Himself:

| *Gross Pay* | *Federal Income Tax Withheld* | *F.I.C.A. Deduction* | *New York State Tax* | *New York City Tax* | *Net Pay* |
|---|---|---|---|---|---|
| $230.00 | $19.70 | $13.92 | $6.70 | $2.80 | $186.88 |

Under current New York law, this employee would be entitled to $115.00 nontaxable unemployment compensation per week, leaving a net loss of $71.88 per week. The International Brotherhood of Teamsters, the largest indi-

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[6] *Hearings on Unemployment Compensation Benefits* before the Subcommittee on Unemployment Compensation of the House Committee on Ways and Means, 94th Cong., 1st Sess., Phase I, 54.

vidual union in the United States, pays $45.00 per week as a strike benefit to strikers on strike for more than one month and accordingly, an employee receiving that particular type of benefit, also nontaxable, would only be losing $26.88 per week. As already indicated elsewhere in this brief, this employee and his family in case of need have the opportunity to seek welfare benefits in various forms under current federal and state statutes. Accordingly, this striking employee has extremely little at risk during the course of this strike and the entire $115.00 per week is charged against his employer, while the strike persists. Obviously, such treatment could vary from state to state, depending upon the operative factors in each instance.

Higher benefits, shorter waiting periods and broader tax bases are not the only possibilities. If paying employer funds to striking employees is a valid policy and does not frustrate the bargaining process in the private sector, does it end there? If it is federal policy, judicially approved, it is ripe for application to the public sector. The last decade has been a veritable "gold rush" for public sector unions. Public employees and their unions are clamoring for the right to strike. Some employees, such as those in Pennsylvania, already have it. 43 Pa. Stat. Ann. 1101.1003. Pennsylvania permits public employees to receive unemployment compensation under the same program covering the private sector. 43 Pa. Stat. Ann. 911(a). The public (employer) pays such benefits to its employees. If it is permissible to extract support from an employer in the form of striker benefits, the citizens of Pennsylvania need only wait for the right political mix before their public employees, who already have the right to strike, will also be entitled to "unemployment" compensation from the public (employer) while they engage in their private combat against the public treasury. State



legislatures, which are notorious for copying federal programs, can cite as justification the federal "tolerance" of striker assistance in the private sector, and public sector unions will invoke the usual observation that public employees should not be treated as "second class citizens". Where does it end? It doesn't. It breeds irresponsibility. It permits gain without risk. And eventually it corrupts the process.

The effects of one state's unemployment statute can go beyond the border of that state and in fact have nationwide repercussions. A union may pick one employer or unit as the target. The agreement negotiated there would become the pattern-setter for the rest of that particular industry.[7] Picking as the target a company or a plant located in a state where strikers can receive unemployment benefits might produce a higher settlement than might otherwise have resulted, which would then become the standard for settlement on national issues throughout the company or industry. The result would have serious impact on interstate commerce and most improperly increase the already raging inflationary pressures in our economy.

The risk of further undermining federal labor policy is all too apparent where strikers can receive benefits despite their disregard or violation of federal labor law.[8] The Act does not require the NLRB to seek injunctive relief for every unlawful strike, only those reasonably thought by the Board to involve unlawful secondary or recogni-

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[7] This was in fact the practice followed by the Communications Worker's of America in this case.

[8] Witness the fact that the strike in the *New York Telephone* matter was indeed found to be an illegal strike under federal labor law. 208 NLRB 267 (1974).

tional objectives. Given the Board's reluctance to use its discretionary authority to enjoin other unlawful conduct,[9] a union strike in support of an unlawful bargaining demand can be maintained for an extended period of time before Board adjudication.

Thus, despite disregard for federal law and illegal activity on the part of the strikers, the victim of this conduct, the employer, can be forced solely because of state law to finance its perpetration. Fair play and reasonable rules to regulate commerce are meaningless if this is permitted. In reality, such laws will provoke constant strife, not peace, disobedience, not respect for law.

The New Deal, the Fair Deal, the New Frontier, the Great Society, all of the attractive goals held up to America as attainable in a free dynamic economy require full production and the complete effort of everyone. To unduly sap the energy of any participant in pursuing these goals by weighting the collective bargaining process with such state intrusion undermines the process. Free collective bargaining is no longer free where either side is penalized for exercising its economic rights. It will destroy the process.

[9] Exercised on only 25 occasions in fiscal 1976, *41st Annual Report of NLRB*, 225.



## CONCLUSION

**For the foregoing reasons, it is respectfully submitted that the judgment below of the Second Circuit Court of Appeals should be reversed.**

Respectfully submitted,

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FILED
JUN 12 1978
MICHAEL RODAK, JR., CLERK

In The

# Supreme Court of the United States

October Term, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

*v.*

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., State Commissioner of Taxation and Finance,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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Spaulding Law Printing
Syracuse, New York

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## PRELIMINARY STATEMENT

Pursuant to Rule 42(2) of the Revised Rules of the Supreme Court, the *amici curiae* respectfully submit this brief in support of the Appellants' position. The written consent of the parties for the submission of this brief has been obtained and has been filed with the Clerk of the Court.

## INTEREST OF THE *AMICI CURIAE*

The question before the Court is whether New York State's grant of unemployment insurance benefits to strikers is preempted by the National Labor Relations Act, *as amended*, 29 U.S.C. §§ 141 *et seq.* (hereinafter "Act" or "NLRA") and by the underlying policy of the Act which guarantees government neutrality in the collective bargaining process. The interest of each of the *amici* in the resolution of this issue is substantial.

In 1974-1975, Rochester Telephone Corporation (hereinafter "RTC"), a publicly held utility having no affiliation with the Bell System, experienced a six-month strike by the Communications Workers of America, Local 1170. After waiting seven weeks, approximately 1,000 of the striking employees applied for and received unemployment insurance benefits from the State of New York. The benefit payments resulted in a drain of RTC's individual unemployment insurance account of $2,291,990. As a result, RTC's unemployment insurance tax rate was increased substantially, and it is estimated that RTC eventually will be required to pay an additional $1,786,357 in unemployment insurance taxes because of the payment of benefits to strikers during the 1974-1975 strike.

In 1969-1970, General Electric Company (hereinafter "GE") experienced a three-month nationwide strike. Upwards of 14,000 of GE's employees in the State of New York applied for and received unemployment insurance benefits during the course of this strike. The benefit payments resulted in a drain on GE's individual unemployment insurance account of approximately $7,700,000. As a result, GE's unemployment insurance tax rate substantially increased. Between October 1, 1970 and September 30, 1974, GE paid an additional $6,224,000 in unemployment insurance taxes as a direct result of the payment of benefits to its striking employees in New York during the 1969-70 strike.

Between March 30, 1972 and July 8, 1972, Otis Elevator Company (hereinafter "Otis") was subjected to a nationwide



strike by its employees represented by the International Union of Elevator Constructors. Between July 1, 1972 and February 7, 1973, Otis was also subjected to a strike by its employees represented by Local No. 1 of the International Union of Elevator Constructors and employed within a 35-mile radius of the City Hall of the City of New York, except Monmouth, New Jersey, but including all of Long Island. During the course of these strikes approximately $1,200,000 in unemployment insurance benefits were paid to approximately 1,000 of Otis's striking employees who were employed in New York State. Otis's unemployment insurance tax rate increased from 1.2 percent in 1972 to 2.7 percent in both 1973 and 1974. As a result, Otis paid approximately $240,000 in increased taxes in 1974.

GE and Otis presently have pending before the District Courts of the Northern and Southern Districts of New York, respectively, suits to enjoin future payment of unemployment insurance benefits to strikers and to recoup the excess unemployment insurance taxes which they have paid. RTC has pending before the Unemployment Insurance Division of the New York State Department of Labor an administrative proceeding to recoup the excess contributions paid by it to the Unemployment Insurance Fund as a result of the payment of benefits to strikers. The court actions and the administrative proceeding are being held in abeyance pending the outcome of the case at bar.

American Broadcasting Companies, Inc. (hereinafter "ABC") was subjected to a strike by approximately 700 of its New York employees from May 19, 1977 to October 1, 1977. ABC brought suit in the Southern District of New York to enjoin the State from paying unemployment insurance benefits to its striking employees and from collecting from ABC increased unemployment insurance taxes as a result of any such payments. On June 30, 1977, Judge Canella issued an Order granting ABC's motion for a preliminary injunction. *American Broadcasting Companies, Inc. v. New York State Department of Labor*, Civ.

No. 77-2995 (S.D.N.Y. 1977). This decision was appealed by the State to the United States Court of Appeals for the Second Circuit. The same panel which issued the opinion herein on appeal stayed Judge Canella's order, so that $564,000 in benefits were paid to ABC's striking employees. That proceeding is being held in abeyance, pursuant to agreement between the State and ABC, pending the outcome of the case at bar.

In 1977, National Fuel Gas Distribution Corporation (hereinafter "National Fuel") underwent a four and one-half month strike by approximately 2100 of its production, maintenance, and clerical employees in the State of New York. All but a few of the striking employees applied for and received unemployment insurance benefits and a total of approximately $1,700,000 in those benefits were paid. The balance in National Fuel's employer account changed from approximately $1,722,000 before the strike to a minus balance of approximately $530,000 after the strike. National Fuel's unemployment insurance tax rate has also been increased by the Unemployment Insurance Division from the pre-strike minimum rate of 1.5% to 4.9% per year, an effective dollar increase in National Fuel's contribution of approximately $335,000 per year. National Fuel has formally protested the increase in the taxation rate.

The Anaconda Company, Brass Division (hereinafter "Anaconda") was subjected to a six-month nationwide strike from October 1, 1977 to April 3, 1978 by approximately 2350 of its hourly employees including approximately 525 New York employees. During the course of the strike, approximately $1,100,000 in unemployment insurance benefits were paid to striking employees in New York. Prior to the strike, weekly unemployment insurance benefits chargeable to Anaconda's industrial unemployment insurance account averaged approximately $1,600. After the seven week waiting period, chargeable weekly benefits exceeded $60,000. Although the



contract settlement ending the strike was approved by all Anaconda employees outside New York State by a margin of 974 to 398, New York employees rejected the settlement by a vote of 396 to 3. Moreover, although New York employees were contractually obligated to return to work on April 3, 1978 because the contract settlement had been ratified by a majority of the Anaconda employees voting nationwide, they chose to prolong the strike and returned to work on April 5, 1978 only after being ordered to do so by the international union.

On October 21, 1976, the employees of Russell Plastics Technology, Inc. (hereinafter "Russell"), a subsidiary of Talley Industries, struck a plant located in Lindenhurst, New York during the negotiation of their first collective bargaining agreement. The strike has not concluded at this date and 50% of the employees who originally struck have never returned to work, although many of them collected unemployment insurance benefits for the maximum entitlement period. During negotiations which took place over the course of the strike, union negotiators repeatedly told the company that the striking employees did not wish to return to work because they were receiving comparable benefits through a combination of unemployment insurance benefits and the union strike benefits. As a consequence of the strike, Russell's unemployment tax rate has increased 50%.

From 1974 through 1976 Buffalo Forge Company (hereinafter "Buffalo") experienced two strikes at its Buffalo, New York facility. The first, involving its officer workers, began on November 15, 1974 and continued until the United Steelworkers of America was decertified as their representative in December, 1975. The second involved production personnel and lingered on for nearly twenty weeks. Approximately 800 Buffalo employees in New York State applied for and received $1,766,682.23 in unemployment benefits during the course of these strikes. Consequently, Buffalo's unemployment tax rate

has increased from 2.1% in 1975 to 4.0% in 1978 after reaching 5.2% in 1977. It is estimated that Buffalo will eventually pay the full $1,766,682.23 in excess unemployment taxes. Buffalo has commenced an Administrative Proceeding before the Unemployment Insurance Division of the New York State Department of Labor seeking a refund of the excess contributions attributable to the 1974-1976 strikes. That proceeding is being held in abeyance pending a decision in this case.

In 1972, Grinnell Corporation (hereinafter "Grinnell") experienced a strike by Local 4756 of the United Steelworkers of America at its plant in Cranston, Rhode Island. After the statutory waiting period, the Rhode Island Department of Employment Security began to pay unemployment compensation benefits to the strikers under the Rhode Island statute expressly authorizing such payments. Gen. Laws R. I. 1956, §28-44-1 *et. seq.* The Rhode Island statute does not materially differ from the New York statute. Grinnell sued in the United States District Court for the District of Rhode Island to enjoin those payments. The District Court dismissed the action. The United States Court of Appeals for the First Circuit reversed and remanded the case for trial. *Grinnell Corporation v. Hackett,* 475 F.2d 449 (1st Cir. 1973). The trial is being held in abeyance pending a decision in this case.

Associated Industries of New York State, Inc. (hereinafter "Associated Industries") is a non-profit corporation organized under the laws of the State of New York, where it has served industry since 1914. It has approximately 2,700 member companies with offices and plants in all parts of the State. The membership includes both manufacturing and non-manufacturing firms which together account for billions of dollars in annual business activity.

Empire State Chamber of Commerce, Inc., (hereinafter "Empire") is a non-profit corporation organized under the laws of the State of New York. Empire represents local chambers of



commerce, business and trade organizations and associations, and individual companies. Its members, located throughout the State, span a broad cross-section of business activity. They are engaged in banking, insurance, commercial, industrial, manufacturing and professional activities, among others.

The New York Chamber of Commerce & Industry (hereinafter "New York Chamber") is a voluntary business association chartered by the State of New York. It is the oldest chamber of commerce in the United States, having been founded in 1768. The current general membership of the New York Chamber consists of over 2,500 business proprietorships, partnerships and corporations, representing the full spectrum of commerce and industry in the City and State of New York. This broad membership comprises businesses of all sizes engaged in virtually all branches of industry.

The combined membership of Associated Industries, Empire and the New York Chamber employs upward of 1,000,000 employees in New York State. Virtually all members are covered by the New York State Unemployment Insurance Law, and a substantial number bargain collectively under the NLRA. Bargaining is conducted under the policy that the government shall not interfere with the balance struck by Congress between the conflicting interests of the parties to a strike or other labor controversy. The interest of the membership, and therefore of the organizations, in any case involving a claim which could effect a departure from that policy is substantial.

## SUMMARY OF ARGUMENT

The Second Circuit Court of Appeals has grievously erred in reaching its conclusion. It has drawn inferences concerning Congress's intent with respect to the payment of unemployment insurance benefits pursuant to statutes such as New York's,[1] from isolated bits of legislative history without regard for the breadth of the labor law pre-emption doctrine formulated so carefully by this Court to assure "a comprehensive national labor law . . . for equitably and delicately structuring the balance of power among competing forces so as to further the common good." *Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286 (1971). In so doing, the circuit court committed two fundamental errors.

First, the court below failed to recognize that the decisions of this Court establishing the primacy of federal control of labor relations require that any state interference with federal labor policy may be permitted only where Congress has *affirmatively permitted* such interference. The court below accepted the fact that the payment of unemployment insurance benefits to strikers has a substantial impact upon collective bargaining. It improperly concluded, however, that such interference should be permitted, absent congressional intent to *prohibit* such interference. The court below, accordingly, reversed the standard with which it should have reviewed the legislative history,

[1] Section 592(1) of the New York Labor Law (McKinney 1977) provides for the payment of unemployment compensation to strikers after a "Suspension of accumulation of benefit rights":

> 1. Industrial controversy. The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning with the day after such strike, lockout, or other industrial controversy was terminated.



resulting in a decision which — premised upon strained interpretations of disjointed and incomplete legislative history — will promote widespread state incursions into the collective bargaining process and will destroy the delicate balancing of labor-management relations effected by Congress and this Court.

Second, the court erred in finding that the evidence indicates that Congress intended to permit states to pay unemployment insurance benefits to strikers. Not only did it improperly infer evidence of intent from congressional inaction, but it arbitrarily failed to give *any* weight to explicit evidence indicating a contrary intent.

Because of these errors, the circuit court reached a decision that was directly contrary to the decisions of every other court which had considered the question. Since the court's erroneous decision has the potential for seriously undermining the entire process of unfettered collective bargaining which is "the fundamental premise on which the Act is based," *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970), it must be reversed.

## ARGUMENT

### POINT I

**The New York statute interferes with the federal labor policy favoring free collective bargaining and is pre-empted unless the state can prove Congress intended such interference.**

#### A. *Federal labor policy guarantees employers and employees the right to engage in the collective bargaining process free from governmental interference.*

This Court has established that Congress has regulated and occupied the field of labor-management relations "to the full extent of its Constitutional power...." *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998 v. Wisconsin Employment Relations Board*, 340 U.S. 383, 391 (1951). Congress did so in order to ensure "a comprehensive national labor law" as a result of "*the perceived incapacity of* common law courts and *state legislatures, acting alone*, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good." *Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. at 286 (emphasis added).

A fundamental principle of the comprehensive federal system of labor law is the policy of free collective bargaining. *Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). Under this mechanism for dispute settlement, the government "acts to oversee and referee the process of collective bargaining," but it is required to leave "the results of the contest to the bargaining strengths of the parties." *H.K. Porter Co. v. NLRB*, 397 U.S. at 108.



Economic power is one of the essential tools which Congress has provided for parties engaged in the collective bargaining process. *NLRB v. Burns Security Services*, 406 U.S. 272, 287 (1972); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 309 (1965); *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 495 (1960). Indeed, the availability of economic force is a prime impetus for negotiating parties to reach an agreement. As this Court stated in *NLRB v. Insurance Agents' International Union, supra:*

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors — necessity for good faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms — exist side by side.

361 U.S. at 489. Because economic warfare is so fundamental a part of the bargaining process, the NLRA envisions a "free play of economic forces" which is simply not subject to state regulation. *Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 144 (1976).

In the absence of a clear and explicit direction in the federal legislation, not even the federal agency established to regulate labor-management relationships, the National Labor Relations Board, is free to "regulate the choice of economic weapons that may be used as part of collective bargaining," nor "to act at large

in equalizing disparities of bargaining power between employer and the union." *NLRB v. Insurance Agents' International Union*, 361 U.S. at 490.

### B. *The New York statute violates the policy of a free play of economic forces.*

Central among the union's arsenal of economic weapons is the power to strike. Balanced against that power is the employer's ability to absorb or pass on financial losses occasioned by a strike. The sensitive balance between these two opposing economic powers is a pivotal element in the collective bargaining process.

It is beyond cavil, and indeed was expressly held by the court below,[2] that the record in the case at bar clearly demonstrates the significant influence upon collective bargaining exerted by the payment of unemployment insurance benefits to striking employees.[3] Direct subsidy for strikers provides a negotiating union's membership with the financial means to refrain from returning to work before their demands at the bargaining table are met. At the same time, since the strikers' subsidy is financed

[2] The Court of Appeals expressly recognized that there is a "... conflict between New York's statute and the broad federal policy of free collective bargaining ...." 566 F. 2d at 395.

[3] In fact, in a related case, the Supreme Court took judicial notice of the overwhelming influence upon collective bargaining of payments made to strikers through welfare assistance programs stating in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 124 (1974):

> It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract.

Unemployment insurance benefits have an even more substantial financial impact upon the employer's position than do welfare benefits, for the former are available as of right to all strikers while the latter are granted only on the basis of need.



with the employer's funds, it saps strength from the employer's economic force by substantially increasing the costs associated with the strike.[4] Management negotiators clearly are motivated by the unemployment insurance scheme to accede to union demands before the strikers' benefits begin to accumulate, causing the employer's insurance fund to be depleted and insurance contribution rates to rise.[5] Thus, the challenged New York statute acts as a double-edged sword against a negotiating employer, at one time both draining management's strength and enhancing labor's.

### C. *The doctrine of pre-emption compels invalidating the New York statute, unless there is affirmative evidence of congressional intent to permit strikers to receive unemployment insurance benefits.*

In recognition of the plenary authority exercised by Congress in labor relations, this Court has established that any state action that interferes with the policy of free collective bargaining is invalid. Thus, notwithstanding the absence of explicit congressional guidelines prohibiting state interference in labor disputes involving employers engaged in interstate commerce, this Court has developed and repeatedly applied the doctrine of federal labor law pre-emption to such disputes. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274 (1971); *see* Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev.

[4] New York Labor Law Section 592(1) (McKinney 1977) grants strikers unemployment insurance benefits after a seven-week suspension period. Benefit payments are made from an unemployment insurance fund which, under New York Labor Law Section 570(1), is financed by the struck employer.

[5] An employer's experience rating determines the amount of its contributions to the fund. The rating has as its basis the sum remaining in the employer's individual account at the end of a year after contributions are credited and benefits paid are debited.

1337 (1972). Simply stated, the doctrine declares that "federal law pre-empts state remedies that interfere with federal labor policy or with specific provisions of the NLRA." *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 635 (1975). Accordingly, the federal courts have uniformly invalidated state action which has a significant direct or indirect impact upon the labor-management relations of parties subject to the NLRA. *See Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission, supra; Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, supra; Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653 (1974); *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252 (1964); *Oil, Chemical & Atomic Workers, Local 5-283 v. Arkansas Louisiana Gas Co.*, 332 F.2d 64 (10th Cir. 1964); *General Electric Co. v. Callahan*, 295 F.2d 60 (1st Cir. 1961), *cert. dismissed*, 369 U.S. 832 (1962).

Because of the pervasive policy of noninterference with the federal scheme of labor-management relations, exceptions to the doctrine of federal labor law pre-emption have been narrowly defined by this Court to include only those cases where (1) an activity regulated by the state was "a merely peripheral concern" of federal labor law, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959); (2) a state regulation "touched interests so deeply rooted in local feeling and responsibility that, in the absence of *compelling congressional direction*, [a court] could not infer that Congress had deprived the States of the power to act," *id.* at 244 (emphasis added); or (3) Congress *"affirmatively indicated"* that the states have the power to regulate, *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, supra* (emphasis added). *See Malone v. White Motor Corp.*, 46 U.S.L.W. 4295 (April 3, 1978) (hereinafter *"White Motor"*); *Lodge 76, International Association of Machinsts & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. at 142-147 (and cases cited therein).



This Court's view of labor law pre-emption was aptly summarized by Professor Cox in his most recent article on the subject:

> [W]here the state law or rule of decision is based upon an accommodation of the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining, or labor disputes ... the likelihood that its application to persons under NLRB jurisdiction will upset the balance struck by Congress *is so great as to require exclusion of state law unless Congress has provided otherwise.*

Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1356 (1972) (emphasis added).

The Second Circuit recognized that the challenged New York statute accommodated the special interests of labor and conflicted with federal labor policy.[6] Conceding the existence of such a conflict, the court below examined congressional intent. Notwithstanding this Court's clear directives that no state interference with the federal labor policy of free collective bargaining will be countenanced unless Congress has "affirmatively indicated" that states may act, the court below held that New York's interference with the collective bargaining process was valid because Congress had failed to expressly prohibit such interference.

The circuit court's error is underscored by this Court's recent analysis in *White Motor*. Justice White, in reviewing the Court's earlier opinion in *Local 24, International Brotherhood of*

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[6] Regarding the payment of unemployment insurance benefits to strikers, the circuit court said that "the matter has long been a political 'hot potato'" and that it "has been a significant political issue since the early 1930s." 566 F.2d at 394, 395.

*Teamsters v. Oliver, supra,* wrote that "The opinion ... recognizes exceptions to this general rule [prohibiting state interference in the collective bargaining process]. One of them ... was the situation *where it is evident that Congress intends a different result.*" 46 U.S.L.W. at 4299 (emphasis added). In *White Motor,* the majority found that Congress had expressly provided by statute that states could regulate pension funds even if interference with collective bargaining agreements resulted.[7]

In contrast, the court below assumed that interference with federal labor policy was permissible unless it could be shown that Congress intended otherwise. The court below found "a positive expression of congressional intent [to permit states to pay benefits to strikers] is lacking ....", 566 F.2d at 391, and concluded that "Our review of the relevant legislative history discloses no clear preemptive intent." *Id.* at 395. Under the standards of labor law pre-emption established by this Court, in light of the acknowledged conflict between New York's statute and federal labor policy, these findings should have compelled the invalidation of the New York law. In other words, the Second Circuit improperly required Petitioners to prove that Congress had intended to forbid payment of unemployment insurance benefits to strikers. Since it is the state that must demonstrate positive evidence of congressional intent to permit interference with federal labor policy, the decision of the court below was incorrect.

[7] The same analysis was shared by the dissent. Justice Stewart wrote that the majority appeared to concede that the state's interference in the collective bargaining process "would be pre-empted by the federal labor laws if Congress had not somehow indicated that the State was free to impose this particular modification." 46 U.S.L.W. at 4300.



## POINT II

**Congress has not demonstrated an intention to allow the states to grant unemployment insurance benefits to strikers and thus to disrupt the balance of economic power which lies at the heart of the collective bargaining process.**

Because the court below was looking for evidence of congressional intent *to prohibit* the payment of unemployment insurance benefits to strikers when it should have been looking for evidence of a clear intent *to permit* interference with federal labor policy, it construed congressional silence as evidence of an intention to carve out an exception to the doctrine of federal labor pre-emption. The circuit court's drawing inferences from congressional inaction reflects a recurring error in its opinion. This Court has repeatedly stated:

> [N]onaction by Congress affords the most dubious foundation for drawing positive inferences .... Whether Congress thought the proposal unwise ... or unnecessary, we cannot tell; accordingly, no inference can properly be drawn from the failure of the Congress to act.

*United States v. Price,* 361 U.S. 304, 310-13 (1960). *See also Waterman S.S. Corp. v. United States,* 381 U.S. 252 (1965); *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963). Notwithstanding this general rule of statutory construction, the court below was persuaded by Congress's *failure* to expressly prohibit the payment of unemployment insurance benefits to striking employees that it intended to allow the states to grant such benefits.

In arriving at its conclusion that legislative history evidences a congressional intent to tolerate the payment of unemployment insurance benefits to strikers, the court below reached a different result from every other court which had considered the issue. *Grinnell Corp. v. Hackett,* 475 F.2d 449 (1st Cir. 1973), *cert. denied,* 414 U.S. 858 and 414 U.S. 879 (1973) (hereinafter *"Grinnell"*); *American Broadcasting Companies, Inc. v. New York State Department of Labor,* Civ. No. 77-2995 (S.D.N.Y.

1977); *New York Telephone Co. v. New York State Department of Labor*, 434 F. Supp 810 (S.D.N.Y. 1977), *rev'd*, 566 F.2d 388 (2nd Cir. 1977); *Hawaiian Telephone Co. v. State of Hawaii Department of Labor and Industrial Relations*, 405 F.Supp. 275 (D. Hawaii 1975), *cert. denied*, 46 U.S.L.W. 3599 (March 27, 1978) (hereinafter *"Hawaiian Telco"*). *But see Olin Corp. v. State of Illinois Department of Labor*, 443 F.Supp. 366 (S.D. Ill. January 9, 1978), *appeal dismissed*, ____F.2d____ (7th Cir. March 21, 1978). Examination of the legislative history presented to the court below clearly demonstrates that there was no warrant for finding congressional intent to permit interference in the collective bargaining process resulting from the payment of unemployment insurance benefits to strikers.

### A. *Enactment of the NLRA and the Social Security Act without express exclusion of benefit payments to strikers.*

Although the NLRA is silent on the subject of unemployment insurance benefits, the Social Security Act of 1935, 42 U.S.C. §§501 *et seq.*,[8] specifies three classes of individuals to whom states could not deny benefits; strikers are not one of these classes. The court below inferred that because Congress had the opportunity to expressly exclude strikers, but did not, it intended to permit the states to intrude upon free collective bargaining by paying such benefits. There is no warrant for this conclusion.

Established in response to a nationwide unemployment problem, the Social Security Act was intended to "substitute for wages lost during a period of unemployment *not the fault of the employee.*" *California Department of Human Resources Development v. Java*, 402 U.S. 121, 130 (1971) (emphasis added).

[8] The act is now known as the Federal Unemployment Tax Act. 26 U.S.C. §§ 3301-09.



The portion of the Social Security Act upon which the circuit court relied provides:

> Compensation shall not be denied ... to any otherwise eligible individual for refusing to accept *new work under any of the following conditions:*
>
> (A) *if the position offered is vacant due directly to a strike, lockout, or other labor dispute;*
>
> (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
>
> (C) *if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.*

25 U.S.C. §3304 (a)(5) (emphasis added). The circuit court positively inferred from Congress's failure to expressly prohibit the payment of unemployment insurance benefits to strikers in the Social Security Act that it intended to tolerate the conflict between statutes permitting such payments and national labor policy.[9] In drawing this conclusion, however, the court incorrectly applied the maxim expressio unius est exclusio alterius to the Social Security Act provision set forth *supra*.

The court's rationale is reminiscent of that maxim because it assumed from Congress's painstaking specification of certain individuals to whom the states cannot deny benefits that Congress must have intended to allow the states to grant benefits to strikers. If it had intended to do so, the court apparently reasoned, Congress could — and would — have ex-

[9] If Congress had intended to include strikers among those to whom compensation could not be denied, it could easily have omitted the modifier "new" (work). Express provision for the receipt of benefits is found elsewhere. 7 U.S.C. § 2014 (c) 1972 Supp., 45 U.S.C. § 351. See infra, pp. 25-26. Therefore, 26 U.S.C. § 3304 (a) (5) could just as easily be construed as a refusal to condone the payment of unemployment benefits to st kers.

pressly proscribed the granting of such benefits. The Court's application of the expressio unius doctrine, however, was incorrect because the Social Security Act addressed itself only to the issue of who should be *entitled* to unemployment insurance benefits, and not to that of who should be *denied* benefits.

In this provision Congress was only reinforcing the principle of neutrality in labor relations with which the New York law admittedly interferes. The design of 26 U.S.C. § 3304 (a) (5) (A) was to prevent state unemployment laws from forcing otherwise neutral third parties into the role of strikebreakers before they could receive benefits. Similarly, 26 U.S.C. § 3304 (a) (5) (C) prevents a state from requiring a party to accept work in a non-union shop before he could receive benefits. Thus, from clear congressional mandates that states follow a neutral policy, the court below anomalously found proof of congressional intent to condone violations of such neutrality.

The Second Circuit relied upon this Court's opinion in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977) (hereinafter "*Hodory*") to support its construction of 26 U.S.C. § 3304 (a) (5). That case examined the issue of whether a state statute *barring* the payment of unemployment insurance benefits to strikers was pre-empted by the Social Security Act or the Federal Unemployment Tax Act. This Court reviewed the legislative history of the Social Security Act and 26 U.S.C. § 3304 (a) (5) to decide if Congress intended, when it enacted those laws, to forbid the states from denying unemployment benefits to innocent parties unemployed due to a strike. This Court held that "neither the Social Security Act nor the Federal Unemployment Tax Act intended to restrict the States' freedom to legislate in thise area." 431 U.S. at 488-489. However, the Court expressly declined inquiry into the pre-emptive effects of the NLRA upon the disputed statute, presumably leaving that issue for a case such as the one at bar. *Id.* at 475, n.3.

Moreover, even if this Court had declared in *Hodory* that the Ohio statute was not pre-empted by the NLRA, the issue in this



case would not be decided. The Ohio statute does nothing more than maintain the neutrality required by the NLRA. In fact, this Court pointed out in *Hodory* that the disqualification in the Ohio statute was at least in part justified by the state's desire to remain neutral in labor disputes. *Id.* at 492. It remains neutral in labor disputes. *Id.* It reinforces – and is therefore compatible with – the principle of free collective bargaining which underlies federal labor relations. That Congress has allowed the states to disqualify those involved in a labor dispute from receipt of unemployment insurance benefits does not even subtly imply that it intended to permit the states to grant direct and substantial economic benefits to strikers at the expense of their employer. Therefore, *Hodory* does not support the holding of the court below.

### B. *Enactment of the NLRA and the Social Security Act without express exclusion of benefit payments to strikers despite testimony before a congressional committee urging that Congress forbid the payment of benefits to strikers.*

The court below believed that the failure of Congress to expressly forbid benefit payments to strikers in either the NLRA or the Social Security Act "takes on additional significance in light of the fact that it had been urged to do so." 566 F.2d at 392. The court also noted that the Senate Committee Report on the Social Security Act provided that "the States are left free to set up any unemployment compensation system they wish . . . ." *Id.*

The weight accorded the existence of some testimony before a congressional committee by the Second Circuit reflects an unrealistic view of the legislative process. According to the leading authority on statutory interpretation, "In view of the great length of the records of many committee hearings, the probative force of particular entries in them may not be great." 2A Sutherland, *Statutory Construction* § 48.10 at 209 (4th ed., C. Sands 1973). Similarly, although "statements of interested

parties appearing at committee hearings urging changes ... have been admitted as evidence, ... in view of the possibility that the changes were unnecessary because the assumed interpretation was erroneous, these statements are very weak evidence that the legislature adopted the determination." *Id.* at 210.

In its lengthy review of the relevant legislative history the *Hawaiian Telco* court addressed the significance of such testimony:

> Careful examination of the legislative record, however, does not reveal whether Congress ever expressly considered these recommendations, all of which were contained in lengthy written reports, and none of whose proponents urged them upon the congressional attention during hearings.

405 F. Supp. at 285. Quite simply, the Second Circuit was incorrect in finding the hearing statements probative of congressional intent.

### C. *Congress was aware of the New York statute when the NLRA and the Social Security Act were enacted.*

The court below also found it "particularly noteworthy" that Congress was aware of the New York statute when the NLRA and the Social Security Act were enacted. In fact, the New York law did not take effect until January 1, 1936, when the first employer taxes were levied.[10] Moreover, benefits could not have been received until January 1, 1938. More importantly, however, there is absolutely no indication that Congress approved of, or was even aware of, the provision according benefits to strikers.

[10] Thus the court below erred when it stated that the New York statute took effect on April 25, 1935, "two months before the NLRA and almost four months before the Social Security Act." 566 F.2d at 393. The statute was only *enacted* in April.



Absent such a showing of intent, an inference, even from inaction, is unjustifiable, let alone "particularly noteworthy."[11]

### D. *Enactment of the Taft-Hartley Act without an express exclusion of benefit payments to strikers although the House bill had such an exclusion.*

The court below sought to infer congressional intent from the legislative history of the Taft-Hartley Act. The House bill contained a provision expressly excluding the payment of benefits to strikers. An accompanying report described the payment of such benefits as a "perversion of the purposes of the social security laws." H.R. Rep. No. 245, 80th Cong., 1st Sess. 12 (1947). The Senate version of the bill omitted the exclusion without explanation. This omission was ostensibly regarded as probative by the Court of Appeals. 566 F.2d at 394.

Unlike the court below, the First Circuit in *Grinnell* evaluated the impact of the deletion:

> Given this silence, the enormous political controversy surrounding the Taft-Hartley Act, and the consequent need for compromises, perhaps unreasoned or hasty, we cannot read this deletion and the subsequent approval of the conference bill as specific congressional resolution of the problem.

475 F.2d at 455. Thus, the First Circuit correctly applied the interpretive rule that legislative silence is a weak tool of construction. Indeed, the House Report may well be a more positive indication of congressional intent, given the intense political

[11] The court below also noted the Social Security Board's approval of New York's statute. It is unclear what, if any, weight was accorded this fact in inferring congressional intent since the court below acknowledged that its significance was "limited" because the Board was "required to approve all laws that met the minimum requirements of 29 U.S.C. § 3304 (a)." 566 F. 2d at 394. More directly, the Court in *Hawaiian Telco* stated, "[t]his fact is immaterial, since the Board was mandated to approve all state laws that met minimum conditions specified by Congress." 405 F. Supp. at 285.

pressures surrounding the legislation. Absent any reason in the legislative history for omitting the provision, there is again, no basis for inferring intent.

### E. *Proposed amendment of the Federal Unemployment Tax Act to discontinue benefit payments to strikers.*

Finally, the court below relied upon the failure of Congress to amend the Federal Unemployment Tax Act in 1969 to prohibit the payment of benefits to strikers and a speech given to the House floor by Representative Mills. The probative value of this evidence was also considered by the *Grinnell* court;

> We are aware of the importance and power of the House Ways and Means Committee and of the significance of its Chairman's statements on bills within its jurisdiction. Yet, in the absence of any floor amendment or debate related to that particular change in either house, and of any real consideration of the issue at any level in the Senate, we cannot take the House Committee's deletion, and Congress' subsequent approval of the substitute bill, as a clear indication of the intent of the entire Congress not to preempt unemployment payments to strikers.

475 F.2d at 456.

Again, there is a complete lack of affirmative evidence of congressional intent to permit the conflict with federal labor policy that results from the operation of the New York statute, a deficiency common to all the evidence marshaled by the court below in attempting to ascertain congressional intent.

As indicated above, the court below should have been looking for affirmative evidence of intent to permit payment of benefits of strikers. Even applying the incorrect standard that it did, not one of the items regarded by the court below as supporting a finding of intent is unambiguous. Particularly in light of the circuit court's recognition that this issue has long been a political "hot potato," it is difficult to understand how it could interpret such legislative inaction as warranting the conclusion



that Congress never intended to prevent the states from regulating in this area.

### F. *There is substantial evidence that Congress did not intend to grant unemployment benefits to strikers.*

As set forth in Point I above, the policy of neutrality in labor relations prohibits the payment of unemployment benefits to strikers. Whenever Congress has departed from this policy, it has explicitly so indicated. Nonetheless, the court below paid no deference to this evidence that if Congress had intended states to permit strikers to receive benefits, it expressly would have so provided.

When Congress set uniform eligibility standards under the Food Stamp Act of 1964, 7 U.S.C. §§ 2011 *et seq.* it enacted the following proviso:

> Refusal to work at a plant or site subject to a strike or a lockout for the duration of such strike or lockout shall not be deemed to be a refusal to accept employment.

7 U.S.C. § 2014 (c) (1972 Supp.).

Similarly, Congress expressly stated that states are free to determine if benefits under the Aid to Families with Dependent Children program, 42 U.S.C. §§601 *et seq.* may be denied to the children of strikers. *Batterton v. Francis*, 432 U.S. 416 (1977).

Benefits under the Food Stamp Act and Aid to Families with Dependent Children vastly differ from unemployment insurance. In the former the basis for the payments is need. Moreover, to the extent that there is interference with the policy of neutrality, it is the taxpayers who make the payments. Unemployment insurance is not awarded on the basis of need and it offends the policy of neutrality by requiring the employer to subsidize the very people with whom it is supposed to be freely bargaining. The circuit court paid no deference to these distinctions in its opinion.

Again, under the Railroad Unemployment Insurance Act, *as amended*, 45 U.S.C. §§ 351 *et seq.*, Congress has expressly provided that striking railway employees may receive benefits (although only after the arbitration system has been exhausted).

With respect to these examples of express congressional intent which result in the readjustment of the parties' bargaining power, the Court below only regarded them as indicative that Congress permits payment of benefits to strikers.[12] They are obvious, of course, as other courts which have considered the issue have found, at least equally indicative of a general policy to prohibit such payments unless Congress expressly authorizes them.

In the *only* instance where it has expressly considered the issue, the District of Columbia unemployment insurance law, Congress decided that strikers were ineligible to receive unemployment benefits.[13] Enacted simultaneously with the Social Security Act of 1935, this legislation is particularly probative because it was designed to "serve as a model to the States, to guide them in the enactment of sound unemployment-compensation legislation." H. Rep. No. 858, 74th Cong. 1st Sess. 8 (1935). Even if this is not conclusive evidence of congressional intent on the question at bar, it is at least directory of what that intent was, and certainly precludes any clear finding of congressional intent to permit benefit payments to strikers.

Thus, aside from the evidence which the court below found persuasive, it curiously skirted evidence indicating that Congress did not intend to permit strikers to receive unemployment benefits.

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[12]This use of congressional action is curiously inconsistent with the court's use of congressional inaction.

[13]Public Law 386, 49 Stat. 946 (1935), although amended, has always excluded unemployment benefits to strikers, Act of Aug. 28, 1935, ch. 794, § 10 (a), 49 Stat. 950; Act of June 4, 1943, ch. 117, § 10 (f), 57 Stat. 115; and Act of Aug. 31, 1954, ch. 1139, § 10 (f), 68 Stat. 995. The District of Columbia law currently provides (D.C.C. § 46-310 (f)):

> An individual shall not be eligible for benefits with respect to . . . [unemployment] as a result of a labor dispute still in active progress . . . .



In view of the foregoing legislative history, it is difficult to understand how the Second Circuit could find a clear legislative intent to permit the payment of unemployment insurance benefits to strikers.

Much more critical and exhaustive treatments of legislative history were undertaken in *Grinnell* and *Hawaiian Telco.* Perhaps the most apt summary of this history is contained in the First Circuit's opinion:

> [G]iven the ability of Congress to articulate that intent [to permit the payment of benefits] in other programs, one might also infer that its silence in the unemployment compensation statute was indicative of a contrary intent. That, too, however, is not a reasonable inference, given the pre-1935 policy, the 1935 Acts and the rejection of explicitly prohibitory legislation in both 1947 and 1969. The most that can fairly be said, in the face of this legislative record, is that Congress has been and presently is aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances.

475 F.2d at 457.[14]

Acceptance of the First Circuit's analysis leads to the inescapable conclusion that the Second Circuit must be reversed, since the undeniable interference of the statute sub judice with the collective bargaining process cannot be countenanced absent clear congressional intent to do so. The *amici* urge this Court to accept the analysis of the First Circuit and to reverse the decision of the court below.

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[14] Professor Cox's article lends support to Judge Coffin's analysis, for it notes that "Congress seems able to enact legislation dealing with labor-management relations only in response to a strong swell of public opinion." Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1377 (1972).

## CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Second Circuit Court of Appeals.

Dated: June 12, 1978

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUN 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),
*Petitioners,*

*vs.*

NEW YORK DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION AND FINANCE,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

# BRIEF AMICI CURIAE ON BEHALF OF DOW CHEMICAL COMPANY, SHELL OIL COMPANY, HAWAIIAN TELEPHONE COMPANY, THE CHAMBER OF COMMERCE OF HAWAII, HOSPITAL ASSOCIATION OF HAWAII, HAWAII EMPLOYERS' COUNCIL, PEARL HARBOR FEDERAL CREDIT UNION AND EWARD D. SULTAN CO., LTD.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-961.**

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),
*Petitioners,*

*vs.*

NEW YORK DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION AND FINANCE,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF AMICI CURIAE ON BEHALF OF DOW CHEMICAL COMPANY, SHELL OIL COMPANY, HAWAIIAN TELEPHONE COMPANY, THE CHAMBER OF COMMERCE OF HAWAII, HOSPITAL ASSOCIATION OF HAWAII, HAWAII EMPLOYERS' COUNCIL, PEARL HARBOR FEDERAL CREDIT UNION AND EWARD D. SULTAN CO., LTD.**

## INTEREST OF THE AMICI CURIAE*

The Dow Chemical Company ("Dow"), the Shell Oil Company ("Shell"), the Hawaiian Telephone Company ("HAWTEL"), Pearl Harbor Federal Credit Union, Edward D. Sultan Company, Ltd., and most members of the Hawaii Employers' Council and the Chamber of Commerce of Hawaii, are "employers" as defined in Section 2(2) of the National Labor Relations Act. 29 U. S. C. § 152(2).[1] The definition of "employer" in the Labor Act was amended in 1976 to include health care institutions as defined in Section 2(14). 29 U. S. C. § 152(14). The members of the Hospital Association of Hawaii, including 16 hospitals and 14 nursing homes, fall within the ambit of that definition. As such, these employers are subject to both the bargaining obligations of the National Labor Relations Act, as amended, 29 U. S. C. §§ 141 *et seq.*, and the unemployment compensation statutes of the various states in which they do business.

The decision of the Court of Appeals below, allowing the states the unrestricted freedom to disburse unemployment compensation benefits to striking employees and to assess the struck employer for those benefits through increased taxes, if affirmed, is of immediate interest to each of these employers. Whether each of the several states have been authorized by Congress to modify the balance of economic power underlying the collective bargaining process will directly impact each of the *Amici*. Further, the variant factual pattern in which the *Amici* have been unwilling

* This brief is being filed with the written consents of all parties. Pursuant to Supreme Court Rule 42(1), these consents are being filed simultaneously under separate cover with the Clerk of the Court.

1. These members ranged in size from large employers, who employ substantial numbers of employees, to small employers, such as the Pearl Harbor Federal Credit Union, who employs only 18 persons.



participants will demonstrate to the Court that the instant case is but one example of a common pattern recurring throughout the Nation.

Dow, for example, is currently engaged in litigation with the State of Michigan and the United Steelworkers of America, AFL-CIO CLC ("Steelworkers") before the United States Court of Appeals for the Sixth Circuit contesting the validity of the disbursement of state unemployment compensation benefits to its striking employees. See, *Dow Chemical Co.* v. *Taylor*, 428 F. Supp. 86 (E. D. Mich. 1977), certified to the Sixth Circuit (E. D. Mich. May 19, 1977) (No. 77-8064). The use of unemployment compensation benefits by the Steelworkers during the Dow strike closely resembles the tactics of the Communications Workers of America, AFL-CIO ("CWA"), in the strike underlying the instant litigation. In 1972 and 1974 the Steelworkers struck manufacturing facilities of Dow located at Bay City and Midland, Michigan. The strikers immediately applied for and, in the substantial majority of situations, received compensation benefits under the Michigan Unemployment Compensation Law, Mich. Comp. Laws Ann. § 421.29(8).[2] This mass utilization of unemployment compensation benefits was not a fortuitous or unplanned development. It was an integral part of the Steelworkers' strike strategy, just as it was an integral component of the CWA's strike tactics in the present case, to utilize unemployment compensation benefits to aid members in withstanding the financial pressures of a strike and optimizing the union's capacity to maintain a strike.

2. Initially the State, as it had historically done, disqualified the employees because their unemployment was due to an active "labor dispute." Subsequently, however, the strikers were permitted to "break" the labor dispute disqualification by earning as little as two dollars from an interim employer. Upon being laid off from their interim job, the striking employees reapplied, and thereafter received full benefits for the statutory 26-week period. At all times during that period, however, they retained their status as Dow's "employees" and had jobs open and available to them which they refused to accept. The State of Michigan disbursed approximately $3,400,000 in the form of unemployment compensation benefits to Dow's striking employees.

Hawaiian Telephone Company, Hawaii Employers' Council and the Chamber of Commerce of Hawaii obtained declaratory and injunctive relief against Hawaii's practice of granting unemployment compensation benefits to employees on strike.[3] See, *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.*, 405 F. Supp. 275 (D. Hawaii 1975). An appeal from that judgment is now docketed before the United States Court of Appeals for the Ninth Circuit, a Petition for Certiorari Prior to Judgment having been denied on March 29, 1978, 98 S. Ct. 1522. Pearl Harbor Federal Credit Union and Edward D. Sultan Co. Ltd., are likewise involved in pending litigation on this subject, and have obtained preliminary injunctions against the processing of claims for unemployment compensation benefits by the State of Hawaii to strikers against those employers. In *Hawaiian Telephone Co., supra*, upon completion of a trial on the merits, the District Court concluded that it was only recently that Hawaii's policy of aid to strikers became fixed. Hawaii grants benefits only to strikers whose employers maintain their business operations despite the strike. The district court held that this policy had a substantial disruptive impact upon the collective bargaining process between HAWTEL and the unions with which it bargained.

Shell is similarly engaged in litigation contesting the validity of the State of Washington's payment of unemployment compensation benefits to striking employees. *Shell Oil Co.* v. *Brooks*, No. C74-1935 (W. D. Wash.). That case arose out of a 1973 strike at Shell's Anacortes, Washington refinery by employees who were represented by the Oil, Chemical and Atomic Workers International Union ("OCAW"). To maintain Shell's production

3. That action filed in the District Court for the District of Hawaii on June 18, 1974 sought to prevent the processing for payment of claims filed by over 3,000 strikers for unemployment compensation amounting to more than $1,200,000. If paid, such benefits would have been charged against HAWTEL's unemployment insurance reserve account, resulting in the imposition of higher payroll taxes upon HAWTEL to replenish that account. By the same token Dow is faced with a potential tax liability for the $3,400,000 that was disbursed to Dow's striking employees.



during the strike, temporary arrangements, including the use of supervisory personnel and employees assigned from other facilities, were implemented by Shell. Washington, however, like Hawaii, permits unemployment compensation benefits to be paid to strikers where a strike fails to curtail the struck employer's production substantially. Pursuant to that policy, the Shell strikers received unemployment compensation benefits for the duration of the 1973 strike. Again, as in Hawaii and Michigan, the grant of unemployment compensation benefits was the result of carefully orchestrated union efforts which had the effect of requiring Shell to finance the strike through its unemployment compensation tax contributions.

The issue presented in the instant case is, therefore, of vital concern to each of these employers, as well as a substantial segment of American industry. Although each state system differs, the ultimate impact of the payments in each case made during the Shell, Hawaiian Telephone and Dow strikes closely resembles the impact found in the case at bar. Thus, the question before the Court—whether the availability of state unemployment compensation benefits to striking employees intrudes into an area left by Congress to the "free play of economic forces" (*Lodge 76, I. A. M.* v. *Wisconsin Employment Rel. Comm.*, 427 U. S. 132 (1976))—is a question that is of great significance to the *Amici*. It is for this reason that they respectfully submit their views to the Court.

## QUESTIONS PRESENTED

1. Whether Congress, in fashioning a comprehensive national labor policy mandating government neutrality in labor disputes and leaving the area of collective bargaining to the free play of economic forces, intended that each of the several states be granted total freedom to subsidize strikers at the expense of their struck employers through the disbursement of unemployment compensation benefits.

2. Whether the federal policy of government neutrality in collective bargaining must give way to state enactments grant-

ing employer-financed unemployment compensation to strikers, regardless of the degree of adverse impact of such benefits on free collective bargaining.

## SUMMARY OF THE ARGUMENT

Federally protected or prohibited employee activities, the historic focus of labor preemption cases, have now been recognized to be but one of "two categories" of labor preemption problems. *Lodge 76, I. A. M.* v. *Wisconsin Employment Rel. Comm.*, 427 U. S. 132 (1977). The other "category" is the permissible extent of the states' legislative power to interfere with the Congressionally prescribed balance of economic interests and weapons underlying the federal collective bargaining scheme. The *Amici* will demonstrate herein that the state policy at issue is invalid for two separate and independent reasons. *First*, the state policy at issue is an effort to readjust the bargaining strengths of the parties and is, therefore, an impermissible rejection of the federal ". . . framework for . . ., collective bargaining, and the conduct of labor disputes. . . ." Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1352 (1972). A state may not, as here, reevaluate the special interests of the strikers, employers, or even the public in collective bargaining and/or labor disputes. *Lodge 76, I. A. M.* v. *Wisconsin Employment Rel. Comm., supra.* See also Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1355-56 (1972), cited and applied in *People* v. *Federal Tool & Plastics, Div. of V. C. A.*, 62 Ill. 2d 549, 555, 344 N. E. 2d 1, 4 (1975). *See also, Sears, Roebuck and Co.* v. *San Diego County Dist. Council of Carpenters*, 46 U. S. L. W. 4446, 4450-4451 (May 15, 1978) (No. 76-750). *Second*, wholly apart from the doctrine of labor law preemption, the disputed state policy is also invalid under a traditional Supremacy Clause analysis which requires the courts to determine empirically whether a state policy has a "tendency to frustrate" (*Nash* v. *Florida Industrial Comm.*, 388 U. S. 235, 237 (1967))



or to palpably obstruct (*Grinnell Corporation* v. *Hackett*, 475 F. 2d 449, 457 (1st Cir. 1973), *ITT Lamp Division* v. *Minter*, 435 F. 2d 989, 993 (1st Cir. 1970), *cert. den.* 402 U. S. 933 (1971), *reh. den.* 404 U. S. 874 (1971)) a federal policy or process.

Heretofore, as a result of either or both of these analyses, the states through their unemployment compensation systems have not been permitted to interfere with the exercise of rights under the Labor Act. *Nash* v. *Florida Industrial Comm., supra.* As the National Labor Relations Board stated to this Court as an *amicus curiae* in *Nash* (br., p. 7):

> Within broad limits, [a state] is unquestionably free to prescribe the conditions upon which employees are entitled to receive the benefits of the State's unemployment compensation system. Nevertheless, a "state may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" * * * This Court has frequently set aside State regulatory schemes found to impair rights created by the National Labor Relations Act. See *Hill* v. *Florida, supra; Auto Workers* v. *O'Brien*, 339 U. S. 454 (1950); cf. *San Diego Building Trades Council* v. *Garmon*. [359 U. S. 236 (1959)] And the conditions that a State may impose upon a grant of benefits are likewise subject to scrutiny to insure consistency with federal policy. *It is quite clear a State cannot condition the grant of benefits in a manner that undermines rights protected by the Constitution or frustrates federal legislation.* [Emphasis added.]

The decision of the Court of Appeals wholly disregards *Nash* and is predicated on an inaccurate construction of legislative history. Hence, if free collective bargaining is to continue to be a basic tenet of the national labor policy, no state may use its unemployment compensation law to frustrate that process absent a clearly articulated, Congressionally prescribed exception permitting such an obstruction. No such clearly prescribed Congressional exception is present in the instant case.

## ARGUMENT

### A. Free Collective Bargaining Without Government Interference Is Essential to the Federal Labor Scheme.

The process chosen by Congress to promote economic stability and minimize industrial strife is unfettered collective bargaining. *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283, 295 (1959). In *Lodge 76 I. A. M.* v. *Wisconsin Employment Rel. Comm.*, 427 U. S. 132 (1976), the Supreme Court recognized that "Congress struck a balance of protection, prohibition, and *laissez faire* in respect to union organization, collective bargaining and labor disputes. . ." 427 U. S. 140, n. 4, quoting Cox, 85 Harv. L. Rev. at 1352. This congressionally defined balance of interests includes the basic precept that the collective bargaining process "be controlled by the free play of economic forces". *Lodge 76 I. A. M.* v. *Wisconsin Employment Rel. Comm.*, 427 U. S. at 140, 177. Indeed, the use of economic sanctions is at the core of this federal scheme. *Id.* at 144. *N. L. R. B.* v. *Insurance Agents Union*, 361 U. S. 477 (1960); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970). "The degree of economic power the parties possess" (*N. L. R. B.* v. *Insurance Agents Union*, 361 U. S. at 489), rather than the "Government . . . control[s] the results of the negotiations." *Id.* at 488. The right to bargain collectively thus clearly contemplates economic warfare, and "does not entail any 'right' to insist on one's position free from economic disadvantage". *American Shipbuilding Co.* v. *N. L. R. B.*, 380 U. S. 300, 309 (1965).

Consistent with these principles, the courts have jealously guarded the process of collective bargaining from state interference. This Court, for example, has heretofore found that for a state "[t]o restrict the objectives for which economic pressure can be applied [see *Local 24, International Brotherhood of Teamsters* v. *Oliver, supra*], or the forms of pressure which are permissible [see *Lodge 76 I. A. M.* v. *Wisconsin Employment*



*Rel. Comm., supra; Teamsters, Local 20* v. *Morton*, 337 U. S. 252 (1964)] tips the scale towards management or union," and is prohibited. See Cox, 85 Harv. L. Rev. at 1353. Not even the National Labor Relations Board is permitted to tamper with the free play of the competitive forces underlying the bargaining process. *H. K. Porter* v. *N. L. R. B.*, 397 U. S. 99 (1970). In *Oliver* this Court explained (358 U. S. at 296):

> Since the federal law operates here, in an area [collective bargaining] where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State.

*Accord, John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance*, 349 Mass. 390, 398, 208 N. E. 2d 516, 522 (1965);[4] and *Delaware Coach* v. *Public Service Commission*, 265 F. Supp. 648, 645 (Del. 1967). The controlling principle that must be applied is that where state action may have a coercive effect, whether direct or indirect, upon the process of bargaining between the parties to a labor dispute, it is prohibited by the overriding federal policy of government neutrality. See, *e.g.*, the various cases in which publicity by state boards of conciliation has been held to be an impermissible intrusion upon the federally protected process of free collective bargaining. *General Electric Company* v. *Callahan*, 294 F. 2d 60 (1st Cir. 1961); *Oil, Chemical & Atomic Workers* v. *Arkansas Louisiana Gas Co.*, 332 F. 2d 64 (10th Cir. 1964); *Grand Rapids City Coach Lines* v. *Howlett*, 137 F. Supp. 667 (W. D. Mich. 1955).

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4. After a careful analysis in *John Hancock Mutual Life Insurance Co.*, the Supreme Court of Massachusetts recognized the full extent to which Congress has occupied this field. Striking down a statute permitting owners of debit life insurance policies an additional grace period in the event of a strike by an insurance company's collecting agents, the court stated:

> For the state to intrude into such an area [of collective bargaining] designed to be kept free is as much a violation of Federal policy as it is for a state to attempt to regulate rights or duties specifically protected by federal acts. 349 Mass. at 403; 208 N. E. 2d at 525.

**B. A State Statute That Predicates the Payment of Unemployment Compensation to Striking Employees Upon Their Status as Strikers Constitutes an Impermissible Reevaluation of the Balance Between Labor and Management Under the Federal Labor Scheme.**

The New York policy is an impermissible special accommodation which has the object and effect of assisting one side in a labor dispute after eight weeks of State neutrality. Normally, an individual who repeatedly refuses to work at his own job is denied unemployment compensation benefits; conversely, other persons in the same circumstances, but engaged in a concerted refusal to work for eight weeks, are entitled under New York law to receive such benefits.[5] The situation of New York Telephone's ("TELCO") striking employees is not unlike that of an employee who has taken a voluntary leave of absence: both are still employees; both are withholding their services for voluntary reasons; and both have their own jobs open and available to them.[6] Striking employees will, however, at the conclusion of an eight-week waiting period be able to

5. See, § 592.1, New York Labor Law, (McKinney 1977).

6. The federal labor laws protects the jobs of striking employees who have not been replaced. See, e.g., *N. L. R. B.* v. *Fleetwood Trailer Co.*, 389 U. S. 375 (1967). The Board and the courts have repeatedly recognized that by becoming a striker a worker does not become unemployed. This principle is rooted in the original Wagner Act's legislative history:

> The term 'employee' also includes any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice, who has not attained any other regular or substantially equivalent employment. The bill thus observes the principle that men do not lose their right only to be considered as employees for the purposes of this bill merely by collectively refraining from work during the course of a labor controversy . . . To hold otherwise for the purposes of this bill would be to withdraw the Government from the field at the very point where the process of collective bargaining has reached a critical stage and where the general public interest has mounted to its highest point. Senate Report No. 573 on S. 1958, pp. 6-7, at II Legislative History of the National Labor Relations Act 2306 (1935).



obtain benefits under the New York statute, while the other employees will be denied those benefits. By the same token in Michigan, a specific statutory provision precludes the payment of benefits to persons who are unemployed as a result of a voluntary leave of absence from their jobs (Mich. Comp. Laws Ann. § 421.29), but a striker in the same circumstances is eligible to receive benefits. Thus, under both the New York and Michigan policies, the strking employees receive benefits while other similarly situated employees do not. The receipt of those benefits results solely from an employee's status as a striker, rather than a neutral factor such as economic need (see, *Lodge 76, I. A. M.* v. *Wisconsin Employment Rel. Comm.*, 427 U. S. at 155) (Powell, J. concurring)). This preferential treatment for striking employees is, as a matter of law, impermissible under the doctrine of labor law preemption. No further factual demonstration is necessary. See, *e.g.*, *Local 24, International Brotherhood of Teamsters* v. *Oliver, supra* and *Teamsters, Local 20* v. *Morton, supra.*

The decision of the Court of Appeals, which condones such a special accommodation, would logically permit even more flagrant intrusions into the federal labor scheme. Each state would presumably be wholly free to strike its own balance of economic interests without regard to its impact upon the federal labor scheme. Such abuses are exemplified by the "stoppage of work" test utilized by Washington and Hawaii to determine the eligibility of a striking employee to receive benefits.[7] That test, succinctly stated, is that a striker is disqualified from receiving benefits unless his employer successfully exercises his federal right to maintain its operations and hence avoid a "stoppage of work". This qualification mechanism strikes at the very core of an employer's right under the federal labor scheme. The goal of an employer in a strike situation is to maintain, to the greatest degree possible, his business operation during a strike and thus

7. See, Haw. Rev. Stat. Ch. 383-30(4); Wash. Rev. Code § 50.20.090.

enhance his economic position at the collective bargaining table. That effort by the employer constitutes the most basic form of self-help. "This weapon of self-help, permitted by federal law, form[s] an integral part of the [employer's] effort to achieve its bargaining goals during negotiations with [unions]. Allowing its use is a part of the balance struck by Congress between conflicting interests of the union, the employees, the employer and the community." *Teamsters, Local 20* v. *Morton*, 377 U. S. at 259. The "stoppage of work" test operates to counter-balance the economic position of the parties where the employer has elected to maintain his business operations.

It is nothing more than an effort to balance bargaining positions by withholding benefits from striking employees when the employer's position is weak and dispensing benefits when the employer is in a strong bargaining position. Such an "attempt to 'introduce some standard of properly balanced bargaining power'" (*Lodge 76 I. A. M.* v. *Wisconsin Employment Rel. Comm.*, 427 U. S. at 149-150) by any state "stands as an obstacle . . . to the objective of Congress" (*Id.* at 151) and is impermissible; ". . . the likelihood that its application to persons under N. L. R. B. jurisdiction will upset the balance of interests struck by Congress is so great as to require exclusion of state law unless Congress has provided otherwise." Cox, 85 Harv. L. Rev. at 1356. The Court of Appeals decision would, however, legitimize such policies.

Each of the states' statutes examined above, regardless of the method utilized to readjust the bargaining positions of the parties, further penalizes the employers involved directly by raising their tax rates in order to provide the benefits to the strikers. This increase in the tax rate of the employer occurs in all states where the relevant statute or subsequent judicial interpretations permit payment by the state of unemployment compensation benefits to striking employees. These taxing schemes act as direct conduits to move funds from the employer to the strikers. The National Labor Relations Board, however, has stated that during a strike



an employer may not be required "to subsidize the strike." See, *e.g.*, *Southwestern Electric Power Co.*, 216 N. L. R. B. 522 (February 14, 1974). A state surely cannot be permitted to require what the Board has prohibited. Compare *Nash* v. *Florida Industrial Comm.*, *supra*. After all, the parties to a federal labor dispute possess certain rights which inherently conflict: the right to strike, and the right to resist a strike. An adjustment of an employer's unemployment compensation taxes to provide a "real cash incentive" to "stabilize employment"[10] is, in a strike context a direct deterrent to employers from exercising their federal right to reject a union's economic terms and attempt to stay in business. "It appears obvious that this financial burden which [a state] imposes will impede" the exercise of an employer's federal right under the Labor Act. *Nash* v. *Florida Indus. Comm.*, 389 U. S. at 239. "A National system for the implementation of the country's labor policies is not so dependent on state law." *Ibid.*

### C. The Disbursement of Unemployment Compensation Benefits in Fact Obstructs the Collective Bargaining Process.

The factual record in the instant case demonstrates the pervasive impact of the New York policy on the federal collective bargaining process. As was noted by the court in *Grinnell Corp.* v. *Hackett*, 475 F. 2d 449, 457-458 (1st Cir. 1973):

> The relevant question then in determining this statute's impact upon the federal collective bargaining policy is whether the receipt or expectation of receipt of unemploy-

10. The purpose of the experience rating system, which varies employer's tax rates directly with the amount of benefits paid to his employees or former employees, is to provide a "stabilization incentive to employers . . . [I]f employers are given a real cash incentive to stabilize and regulate their employment they will be able" to minimize unemployment. 79 Cong. Rec. 9271, 74th Cong., 1st Sess. (June 14, 1935) (Comments of Sen. Harrison). See also Sen. Rep. No. 628, 74th Cong. 1st Sess. (May 13, 1935), p. 14. Here, by the same process, the incentive inherently discourages employers from resisting union demands.

> ment compensation benefits after [eight] weeks of a strike causes workers to stiffen bargaining demands beyond those they would have made without such benefits, to strike in the first instance when they would otherwise have settled, or to continue a strike for a longer period than they otherwise would.

Upon careful consideration of the factual record now before this Court, the District Court made the specific finding that "unemployment compensation *does* have an impact on strikes." *New York Telephone Co.* v. *New York State Department of Labor,* 434 F. Supp. 810, 819 (S. D. N. Y. 1977). [emphasis added.][11] Even a cursory review of the record demonstrates the propriety of that conclusion.

The factual record demonstrates that the expectation of the New York members of the CWA, that unemployment compensation benefits would be disbursed after eight weeks,[12] did cause them to stiffen their local demands beyond those that would have been made had there been no such benefits, and further, that they did continue to strike for a longer period than they otherwise would have occurred. *New York Telephone Co.* v. *New York State Department of Labor,* 434 F. Supp. at 813-814. After a nationwide agreement was reached on July 18, 1971, between the Petitioners and the CWA, roughly 38,000 CWA members employed by the Petitioners remained on strike in New York.

11. The Court of Appeals implicitly accepted the factual determinations made by the District Court, but concluded that "the conflict between New York's statute and the broad federal policy of free collective bargaining does not render the state statute unconstitutional." *New York Telephone Co.* v. *New York State Department of Labor,* 566 F. 2d 388, 395 (2d Cir. 1977). The *Amici* submit that that conclusion is incorrect since the Second Circuit reversed the burden of proof improperly. Where, as here, the record factually establishes the actual obstruction of a federal statute, the burden is on the state to demonstrate that such an obstruction has been authorized. Such an authorization, however, does not exist. See p. 21, *infra.*

12. The New York statute provides for the payment of unemployment compensation benefits to striking employees, regardless of a showing of need, after the conclusion of an eight week waiting period. N. Y. Labor Law §§ 590.9, 592.1 (McKinney 1977).



During the first week of September, 1971, strikers became eligible for weekly unemployment compensation, which under the law in effect in 1971-1972, amounted to a maximum of $75.00. During the course of that strike, some $49,000,000 in unemployment benefits were disbursed to the striking employees. The significance of those payments was acknowledged by the Union leadership, and thus, as was concluded by the District Court, the receipt of benefits was "a substantial factor affecting [the strikers] willingness to go on strike, or once on strike, to remain on strike." *New York Telephone Co.* v. *New York State Department of Labor,* 434 F. Supp. 814-816.

Union reliance on state subsidies to sustain striking members is not limited to Petitioners' employees, the CWA or to the State of New York. A similar pattern recurs nationally.

1. The facts revealed in discovery during the proceedings in *Dow Chemical Co.* v. *Taylor,* 428 F. Supp. 86 (E. D. Mich. 1977), appeal pend. (6th Cir.) (No. 77-8064) exemplify the problem. In 1972 and 1974 two different local affiliates of the United Steelworkers of America ("Steelworkers") struck the manufacturing facilities of Dow located in Bay City and Midland, Michigan, respectively. The State of Michigan disbursed approximately $3,400,000 in the form of unemployment compensation benefits to Dow's striking employees. As stated in the verified complaint on the average, the benefits disbursed to each recipient approximated almost 50 percent of each worker's net compensation after tax deductions. This utilization of benefits was not fortuitous or unplanned but was, in fact, a part of the Steelworkers' comprehensive strike and defense program used by its local affiliates, in conjunction with allotments from the International Strike and Defense Fund, to aid local members in withstanding the financial pressure of a strike situation.

The importance that the Steelworkers' local unions placed on the availability of unemployment compensation benefits is dem-

onstrated by their actions during the course of the two Dow strikes. Officials of both locals directed the membership to file claims even though the Michigan statute on its face prohibited the payment of those claims.[13] In an April 1, 1974 newsletter, for example, it was stated that "[e]veryone should file for unemployment benefits even if they have not found [an interim] job." Additionally, both Steelworker locals informed their members that should any member's claim be denied, the local unions would provide legal counsel to appeal that denial, the Bay City union ran an ad in the newspaper to aid its union members in getting interim jobs to break the strike disqualification, and the officers of the union met with the Michigan Employment Security Commission officials to enhance the probability that Dow's striking employee would encounter no obstacles when applying for benefits.

The fact that the state of Michigan's unemployment compensation benefits were the primary economic resource relied on by the Steelworkers, is best illustrated by a simple comparison. The 1974 strike was commenced in March, 1974, and settled approximately twenty-six weeks later in September when the stream of state unemployment compensation benefits was due to decline. During that period the strikers received over $3,000,000 from the State whereas *all* other sources, including

13. That statute provided, *inter alia*, that "an individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute in active progress . . ." See Mich. Comp. Laws Ann. § 421.29(8). However, in 1968 the Michigan Supreme Court held that the statutory labor dispute exemption did not apply to strikers who had obtained "interim employment" after the commencement of a strike. *Great Lakes Steel Corporation* v. *Employment Security Commission*, 281 Mich. 249, 161 N. W. 2d 14. The effect of that decision is demonstrated by the 1972 and 1974 Dow strikes in which the state initially, as it had historically done, disqualified the employees because their unemployment was due to an active "labor dispute." Subsequently, however, the strikers were permitted to "break" the labor dispute disqualification by earning as little as two dollars from an interim employer. Upon being laid off from the interim job, the striking employees reapplied, and thereafter received full benefits for the statutory 26-week period.



the Steelworkers' strike fund, only provided $2,148,003.26 to the Midland local union. Of these latter moneys none was distributed directly to the strikers and only $96,331.86 was distributed to the creditors of the strikers. The maintenance of the economic position of the individual strikers was, accordingly, the task of Dow, as coerced by the State of Michigan.

2. The factors surrounding the Shell strike at its Anacortes, Washington, refinery further bear out the substantial impact on collective bargaining that flows from the payment of unemployment compensation benefits to striking employees. As a result of a breakdown in collective bargaining negotiations between Shell and the Oil, Chemical, and Atomic Workers ("OCAW"), the latter called a strike and established a picket line at Shell's Anacortes premises at noon on January 24, 1973, resulting in a walkout by the 220 employee-members of OCAW. The strike continued and the picket lines were maintained until June 1, 1973, when, following the consummation of a collective bargaining agreement, the strike ended and all of the striking employees resumed work. During the strike temporary arrangements, including the use of supervisory personnel were implemented by Shell, as permitted by federal law, in an effort to maintain production at its Anacortes refinery. The State, however, follows, as noted above, a policy of granting unemployment compensation benefits to striking employees, notwithstanding that they have work open and available to them, when the employer manages to maintain production, i.e., avoids a "stoppage of work."[14] Accordingly, solely due to Shell's effort to maintain its business operation, the State paid full unemployment compensation benefits to Shell's striking employees. As in the Dow strikes by the Steelworkers, the strikers' applications for the disputed benefits were not fortuitous, but in accord with guidelines set forth in the OCAW strike manual. In addition, in anticipation of the strike, OCAW finance, welfare and employment commit-

14. See, Wash. Rev. Code § 50.20.090; *Shell Oil Co.* v. *Brooks*, 88 Wash. 2d 909, 567 P. 2d 1132 (1977).

tees were formed at Shell, *inter alia*, to handle the collection and distribution of money to strikers, and to assist strikers in obtaining benefits from public and private agencies. These facts, as in the instant case, bear out the substantial impact that the payment of unemployment compensation benefits has on the bargaining process.

3. The evidence adduced by HAWTEL in its action provides details as to how actual bargaining positions are altered. In early 1974, an award of $100,000 in unemployment compensation benefits to striking employees of the Hawaiian Electric Company was announced and publicized. According to the testimony of Donald Kuyper, Vice-President of HAWTEL, after reading of this decision in the newspapers, he immediately recognized the importance of the availability of such benefits in the upcoming HAWTEL negotiations, and the impact of the resulting increased taxes on HAWTEL's bargaining position. *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor & Indus. Rel.*, 405 F. Supp. 276, 279 (D Hawaii 1975). He discussed this development with his Executive Committee and consulted the Vice-President for Industrial Relations of the Hawaiian Electric Company about the decision, who told him how the "work stoppage test" had been applied. As the HAWTEL bargaining negotiations approached the strike deadline of April 30, 1974, Kuyper considered several factors to be of major significance: (1) the recent award of unemployment compensation to strikers, (2) the past period of layoffs and the employees' concern for job security; (3) the rising cost of living; and (4) the removal of governmental controls on wages.

Prior to the announcement of the receipt of unemployment benefits by the Hawaiian Electric strikers, HAWTEL had budgeted for an anticipated eight percent (8%) total wage and benefit increase. By May 6, 1974, however, HAWTEL had offered, and the union negotiating committee had submitted to the membership for acceptance or rejection, an offer for a two-year contract with a nine percent (9%) wage increase during



the first year, and eight percent (8%) during the second. This additional 1% increase during the first year in its offer was $320,000 above HAWTEL's original cost plan. When this offer, submitted by the union negotiating committee to the membership, was voted down, a strike commenced on May 7, 1974. Mr. Kuyper explained that one of the reasons he increased his original as well as his final offer to the Union was the knowledge that unemployment compensation gave the Union the ability to go and stay out on strike.

The availability of those benefits was similarly a pervasive factor in the International Brotherhood of Electrical Workers, Local 1357's ("IBEW") bargaining position. The IBEW officer, Mr. Victor, testified that inquiries were made by his members "to tell [the union leadership] to get the information [with regard to the availability of unemployment compensation benefits] before [a strike vote] so that [the employees] would know whether they should make up their mind to strike or not. . . ." *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.*, 405 F. Supp. at 281. After the strike started, striker inquiries as to the availability of unemployment compensation inundated the IBEW strike headquarters. Virtually all the striking employees applied for unemployment compensation benefits as a result of the following factors: an extensive Union campaign; pre-strike arrangements with the State unemployment compensation agency; the use of Local 1357 representatives to obtain the signatures of the striking applicants on special mass sign-up sheets provided by the State; and common representation of the striking applicants by Union business agents and lawyers before the State unemployment compensation agency. Even more telling was the admission by the IBEW, in conjunction with the Hawaii AFL-CIO and the other major Hawaii unions, that victory for HAWTEL in *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.*, *supra*, would, as stated in their published leaflets, materially affect *"strikers' right and ability to strike"* and indeed "cripple

. . . strikes in the future," *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.*, 405 F. Supp. at 281-282. [emphasis added.] These admissions were part of a public union effort, including rallies and "mass picketing," to "defend the right to strike" during the proceedings before the district court in *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.*

The District Court in *Hawaiian Telephone*, after completion of a trial on the merits, concluded that the availability of unemployment compensation benefits to the strikers at HAWTEL's expense, had a clear impact on both the employees and the employer. *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.*, 405 F. Supp. at 282. It noted that the expert witness, who testified for the Hawaii AFL-CIO and the other defendant unions,

> . . . Mr. Ruttenberg, conceded that (1) the existence of a strike fund may be a significant factor in the results of collective bargaining; (2) the existence of a large available source of funds during a strike is used by unions to impress employers that the union has the resources to back up a threat to strike; and (3) the loss of income to strikers is a factor in the minds of strikers when deciding whether to accept an employer's collective bargaining offer. 405 F. Supp. at 280. [footnote omitted.]

As is apparent from the foregoing, the factual pattern before this Court is not a single, isolated incident in the State of New York, but is instead part and parcel of a nationwide effort by unions to utilize unemployment compensation benefits to finance their strike efforts. That pattern, as summarized above, bears out the assertion that the availability of such benefits does in fact have a devastating and impermissable impact on the positions of the parties to collective bargaining negotiations.



### D. The States Have Not Been Authorized to Modify the Balance of Interests Struck by Congress.

Notwithstanding whether the disputed New York policy (1) is viewed as a "palpable infringement" on the collective bargaining process (*Grinnell Corporation* v. *Hackett*, 475 F. 2d at 457), or (2) is determined to constitute a prohibited "special accommodation" (*Lodge 76, I. A. M.* v. *Wisconsin Employment Rel. Comm.*, 427 U. S. at 156), the burden is properly on the State to demonstrate that the obstructive policy has been authorized by Congress. As this Court has concluded in the past, federal labor policy is presumed to insulate the mechanics and dynamics of the collective bargaining process from adjustments by the states. See pp. 8-9 *supra*. Accordingly, the requisite Congressional authorization should not be lightly inferred. See pp. 28-33, *infra*. The Court of Appeals' contention on this issue, that legislative history indicates such approval was at odds with the decision of every other court that had addressed the question.[16] As the United States Court of Appeals for the First Circuit concluded:

> [T]he existing legislative record is not sufficiently clear to establish congressional intent either way . . . . The most that can fairly be said, in the face of this legislative record, is that Congress has been and presently is aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances . . . . [U]nambiguous Congressional intent is lacking.

As was found by the First Circuit, the requisite clear congressional approval is lacking. If any inferences may be drawn from the legislative history, they are that (a) Congress, in the National Labor Relations Act intended to strike a balance among the

16. See, e.g., *Grinnell Corp.* v. *Hackett, supra, Hawaiian Telephone Co.* v. *Hawaii Dept. of Labor and Indus. Rel., supra; Dow Chemical Co.* v. *Taylor*, 57 F. R. D. 105 (E. D. Mich. 1972) *interloc. appeal pend.* (6th Cir.); *American Broadcasting Cos.* v. *New York State Dept. of Labor*, 77 Civ. 2995 (S. D. N. Y. June 30, 1977). *Cf. Owlin* v. *Illinois Dept. of Labor*, 443 F. Supp. 366 (S. D. Ill. Jan. 1978)—which followed the decision of the Court of Appeals for the Second Circuit.

respective interests of the parties in collective bargaining (see *Lodge 76 I. A. M.* v. *Wisconsin Employment Rel. Comm.*, 427 U. S. at 146), (b) Congress never intended that the states would grant unemployment compensation to strikers, and (c) where Congress intended to assist strikers financially, it has expressly done so.

### 1. The New York Statutes Fall Within the Ambit of the Supremacy Clause

In 1935, Congress was drawn reluctantly into the unemployment compensation field. Earlier, the states had been unable to take the initiative in that area, "due largely to the fact that to do so would handicap their industries in competition with the industries of other States." H. Rep. No. 615, 74th Cong., 1st Sess. (April 5, 1935), p. 8. Accordingly, Congress did not "set up a federal unemployment compensation system . . . [but] merely [made] it possible for the states to [do so] (Sen. Rep. No. 628, 74th Cong. 1st Sess. (May 13, 1935), p. 12) by assessing a uniform nationwide tax upon employers against which employer payments to state unemployment compensation plans would be credited. Since the same tax would be paid by employers without regard to the existence of a state program, the "principal obstacle" (H. Rep. No. 615, p. 8) to state action was removed, and the possibility of retaining tax funds within a state provided an incentive to create state plans. Otherwise, "[e]xcept for a few standards . . . the states [were] left free to set up any unemployment compensation system they wish, without dictation from Washington" (Sen. Rep. No. 628, p. 13) *as long as* their actions did not derogate from other federal legislation. See *Nash* v. *Florida Industrial Commission, supra,* and *Grinnell Corporation* v. *Hackett, supra.*

The conclusion of the court below, that Congress intended to permit the states unbridled freedom to dispense unemployment compensation without regard of the impact of the states' practices on the federal labor scheme or other federal statutes, dis-



regards this Court's pronouncement in *Nash* and is predicated on an inaccurate construction of the legislative history.[17] The federal unemployment compensation tax law only enumerates certain minimal requirements that are reviewed and certified to have been satisfied by the Secretary of Labor. The Secretary, and his predecessor, the Social Security Board, have always had to "approve any state law submitted to [them]" (26 U. S. C. § 3304) which met these requirements and have not been permitted to exercise any discretion or administrative expertise. Hence, as demonstrated in *Nash* v. *Florida Industrial Commission, supra,* apart from the express requirements of the statute, the Supremacy Clause applies fully to all other provisions or applications of a state plan.

### 2. Congress Never Intended That the States Would Compensate Strikers

Congress did not anticipate even the possibility that unemployment compensation programs would be extended to strikers. The state plans were only intended to create "reserves during periods of employment from which compensation [would be] paid to workmen who *lose their positions when employment slackens* and who cannot find other work . . . Payment of compensation is conditioned upon continued *involuntary unemploy-*

17. The Court of Appeals relied upon references in the legislative history of the Social Security Act with regard to the desire of Congress to permit experimentation by the States. What the court failed to appreciate was that the subject of that history was not the payment of unemployment compensation benefits. The primary thrust of the legislative history dealt not with eligibility standards, but with alternative methods of creating a constitutional *financing* and *funding* system. See *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936) and *Schecter Poultry* v. *U. S.*, 295 U. S. 495 (1935). References within the congressional reports to the range of possibilities that the States could adopt referred to allowing the states the choice between "pool funds" or "individual employer accounts." Witte, *The Development of the Social Security Act* (U. of Wis. Press, 1963), pp. 141-145. The issue on the minds of Congress was the constitutional implication of this new venture—not the creation of an exception to the preemptive impact of the then only recently-enacted National Labor Relations Act.

*ment.*" Sen. Rep. No. 628, p. 11. [Emphasis added.] The underlying assumption was that a worker would take available work; nowhere in the legislative history is there any indication that a striker was exempted from that intent.

Congress did protect uninvolved third parties from being forced by a state to become strikebreakers, but did not extend that protection to strikers themselves.[18] Instead Congress, while simultaneously drafting the Labor Act, defined a striker to be an "employee." See p. 10, n. 6, *supra,* and p. 30, n. 30 *infra.* Moreover, when Congress has intended to readjust the economic bargaining position of parties under the Labor Act, it has done so expressly.[19] And with regard to unemployment compensation

18. Congress set forth three standards regarding available new work (Sec. 903(a)(5) of Public Law No. 271 (1935); 26 U. S. C. § 3304(a)(5);

> Compensation shall not be denied . . . to any otherwise eligible individual for refusing to accept *new work* under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization; [Emphasis added.]

If, in fact, Congress wished to include strikers, it could have readily deleted the modifier "new" (work) as it did elsewhere. In the Food Stamp Act (Public Law 91-671, 84 Stat. 2048 (1971)), for example, it was expressly provided that it is not a refusal to accept employment to refuse to work ". . . at a plant or site subject to a strike or lockout . . ." 7 U. S. C. § 2014(c). See also n. 19, *infra.*

19. Congress has acted in two areas to accommodate federal labor policy to other objectives. First, in situations of total economic deprivation Congress expressly provided for the disbursement of food stamps (see n. 18, *supra*), and, by way of administrative regulation, welfare benefits. *Francis* v. *Davidson,* 340 F. Supp. 351, *sum. aff'd.* 409 U. S. 904 (1972).

In far different circumstances, in order to encourage use of an arbitration system thereby preventing costly railway work stoppages, Congress granted unemployment benefits to striking railway employees who exhausted the arbitration system. Otherwise, no benefits are paid. 45 U. S. C. § 351; *Brotherhood of Ry. and S. S. Clerks,*

(Footnote continued on next page.)



in the *only* situation where Congress acted directly at the local level, in the District of Columbia, strikers have always been excluded[20] under a provision, passed simultaneously with the Social Security Act of 1935 putting "into effect the provisions of the social security bill in regard to unemployment compensation for the District of Columbia," that was intended to "serve as a model to the States, to guide them in the enactment of sound unemployment compensation legislation." H. Rep. No. 858, 74th Cong., 1st Sess. (May 9, 1935), p. 8. As the "beacon light" for the states, Congress provided that an applicant ". . . must not be engaged in a strike. . . ."[21]

An examination of the "draft state bills" with which Congress worked prior to passage of the Social Security Act in 1935, and which were distributed by the Social Security Board after passage in 1936, rebuts any contention that Congress intended to authorize a state intrusion into the scheme of the National Labor Relations Act which, at that time, had not even been implemented. On June 8, 1934, President Roosevelt created the

(Footnote continued from preceding page.)

*Freight Handlers, Exp. and Station Employees Union* v. *Railroad Retirement Board,* 239 F. 2d 37 (D. C. Cir. 1956). The system, in short, is a compromise necessitated by the paralyzing effect of even short railway strikes and the need to promote the use of the arbitration system with economic incentives. Congress' use of such benefits as an incentive demonstrates that Congress recognizes the role such benefits play in a strike. In general, however, Congress has found no reason which over-balances the beneficial effects of free collective bargaining and has provided no other exceptions to permit government intrusion.

20. Currently the law in the District of Columbia provides (D. C. C. § 46-310(f):

> An individual shall not be eligible for benefits with respect to . . . [unemployment] as a result of a labor dispute still in active progress . . .

Since 1935, the law in the District of Columbia, although amended, has always excluded strikers. Public Law 386, 49 Stat. 946 (Aug. 28, 1935); Public Law 65, 57 Stat. 100 (June 4, 1943); and Public Law 721, 78 Stat. 988 (August 31, 1954).

21. 79 Cong. Rec. 8274, 8276, 74th Cong. 1st Sess. (May 27, 1935)—comments of bill manager, Ellenbogen, R.

Committee on Economic Security. In February, 1935, E. E. Witte, the Committee's executive director, presented to Congress the basic outline for what was to become the Social Security Act of 1935, which included the proposed unemployment compensation system. Concomitantly, the Committee submitted to Congress "draft" bills for state plans, each of which provided that:

> An employee shall not be eligible for benefits for any week in which his total or partial unemployment is directly due to a labor dispute still in active progress in the establishment in which he is or was last employed.[22]

The District of Columbia law, as noted above, originated from this model. It was with these "draft bills," that Congress worked while drafting the social security bill in 1935.

A year after the Social Security Act became law, in September, 1936, the Social Security Board issued a "draft bill" which rejected the "labor dispute in active progress" language and began suggesting instead, different language, *i.e.*, "stoppage of work"[23] adopted from the British system, be used by the states. This changeover from the "labor dispute in active progress" to the "stoppage of work" language, however, was not based on any intent to alter the substance of the original proposal. The former clause was "not recommended because 'a dispute in active progress' is very difficult of precise determination."[24] This administrative desire to ease the job of bureaucrats was not followed by Congress, however, when it amended the District of Columbia law in 1943 and 1954.

The "stoppage of work" language, as then understood, would have precluded the TELCO strikers from receiving benefits.

22. Hearings on the Economic Security Act before the U. S. Senate Committee on Finance, 74th Cong., 1st Sess. (February 9, 1935), pp. 591-632, 601, 621.

23. See *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.* 425 F. Supp. at 287.

24. *Unemployment Insurance Legislative Policy Recommendations for State Legislation 1962*, U. S. Dept. of Labor, Bureau of Employment Security; and see the prior editions.



The "stoppage of work" language was adopted from the British statute which had been construed for twenty years and had become a term of art with a concrete meaning. In recognition of that history and to assist the states in applying that language, the Social Security Board distributed, as part of its interpretation service, the text of selected British decisions in June 1, 1938.[25] The principle which emerges from those precedents is that the "stoppage of work" exclusion precluded the payment of benefits to striking employees until their employer either *permanently* replaced them or made other permanent adjustments in the production method so that no job vacancies existed for the strikers to fill.[26] As one authority, distributed to the states by the Social Security Board, stated:

> From the above analysis, it is apparent that the British authorities in determining whether a stoppage of work existed looked first to see whether any job vacancies were created by the dispute. The implication of the statements in the Analytic Guide is that if such vacancies were created and continued to exist for any appreciable length of time,

25. *Unemployment Compensation Interpretation Service.* "Benefit Decisions of the British Umpires; a codification and Text of Selected Decisions (Social Security Board, June 1, 1938).

26. Benefit Decisions of British Umpires, *op. cit.*, p. 597 (British Umpire Case 496—Case Nos. 2575 and 2576):

> "It was difficult to get any clear measure of the effect of the dispute on output, but representatives of the employers intimated that, speaking generally, all orders were being completed at the proper time . . . [T]he employers had rearranged the work and were able to cope with all the work which required to be carried out.
>
> * * * * *
>
> Decision: The Court of Referees find . . . it was possible for the management to maintain substantially the same output after the dispute as before, but having some of the men working longer than they had previously been working. The position appears to be, however, that the applicants' places were not filled, in the sense that their services were no longer required. *They continued to be in the position that there was work which they would be doing but for the dispute, and in my judgment that must be held to constitute a stoppage of work which was due to a trade dispute.*" [Emphasis added.]

> there was a stoppage of work . . . Under the British interpretation of the work "stoppage" the individual is disqualified for benefits if his unemployment is due to a trade dispute so long as the job which he held continues to be vacant. It would be necessary for the claimant to show that the job vacancy had been filled in some way in order to effect a termination of his disqualification.[27]

In short, strikers were afforded benefits only when they were *permanently* displaced and would, therefore, have been without employment regardless of the existence of a labor dispute. The TELCO strikers were not so displaced. As individuals unemployed, who had work available to them, who remained part of the work force and who anticipated returning to their struck jobs, they were not meant to obtain unemployment compensation benefits. As this Court has stated:

> ". . . providing for 'security during the period following unemployment' was thought to be a means of assisting a worker to find substantially equivalent employment. . . . It is essential that they be permitted to look for a *job. They should not be doing anything else but looking for a job." Calif. Dept. of Human Resources Development* v. *Java,* 402 U. S. 121, 132 (1971). (Footnotes omitted and emphasis added.)

The striking employees here had jobs; they were not looking for other work. The denial of benefits to such persons, in addition to eliminating an intrusion into the labor scheme, conforms with the intent of the Social Security Act. See pp. 23-25, *supra.* The contrary construction of the Court of Appeals derogates from rather than harmonizes both statutes.

**3. The Court of Appeals' Misconstrued the Legislative History.**

The expressions of Congressional intent relied on by the Court of Appeals can be separated into general categories:

27. See attachments to Unemployment Compensation Program Letter No. 000 which was separately published as: Hughes, Marsile, J., *Principles Underlying Labor Dispute Disqualification* (Social Security Administration, July 1946), p. 26.



(a) that Congress has permitted other public subsidies to strikers; (b) that Congress granted the states total freedom under the Social Security Act without regard to other federal laws; and (c) that the silent death of a number of Congressional bills in this area constitutes controlling legislative history.

a. The *Amici* recognized that in certain narrow circumstances Congress has modified the collective bargaining scheme by granting certain welfare benefits,[28] or food stamps based, in contrast to the disputed benefits in the instant case, *on need,* and has also used unemployment compensation benefits as an incentive to follow the "interminable process" (*Detroit & Toledo Shoreline Rail Co.* v. *United Transportation Union,* 396 U. S. 142, 149) of exhausting the tedious administrative remedies of "cooling off" procedures under the Railway Labor Act. See pp. 24-25, n. 19, *supra,* and *Brotherhood of Ry. and S. S. Clerks, Freight Handlers, Exp. and Station Employees Union* v. *Railroad Retirement Board, supra.* Those modifications of the national labor scheme are, of course, the choice of Congress. Where, however, Congress has made no such choice, as is the situation here, the states may not, without Congressional authorization, individually modify the national scheme.

b. The Court of Appeals inferred that, since "neither the Social Security Act nor the Federal Unemployment Tax Act [were] intended to restrict the States' freedom to legislate" in the disputed area (*Ohio Bureau of Employment Services* v. *Hodory,* 431 U. S. 471 (1977)), it should also be assumed that the National Labor Relations Act does not restrict state action. *First,* such a construction of *Hodory* would nullify the fact that

28. In *Francis* v. *Davidson,* 340 F. Supp. 351 (Md. 1972) *aff'd,* 409 U. S. 904 (1972) a district court held that federal welfare regulations required the distribution of welfare benefits to the *needy* even if they were striking employees. Subsequently, the federal regulations were amended to specify expressly that the states had the option of setting their own policy with regard to strikers. See 38 Fed. Reg. 49 (January 3, 1973) and 45 C. F. R. 233.100 (July 6, 1973) and *Batterton* v. *Francis,* 432 U. S. 416 (1977). Here no similar express grant of the decisional power to the states in this area exists.

this Court therein expressly declined to consider the preemptive effect of the federal labor scheme upon state policies permitting the payment of benefits to strikers. 431 U. S. at 475 n. 3. *Second,* the Court of Appeals' reliance on the prohibition contained in the Social Security Act forbidding the denial of benefits to persons who refuse to accept "new" work "vacant due to a labor dispute" is misplaced. See p. 24, n. 18, *supra.* This restriction was necessary to preserve, not defeat, state neutrality by precluding the states from requiring strangers to a labor dispute who are by definition not "workers involuntarily unemployed"[29] to work as strike breakers. The overriding policy of government neutrality contained in the Labor Act, however, was not otherwise threatened by the history of Social Security Act.[30] The assumption that an applicant for benefits be available for work, the definition of a current employee contained in the Labor Act (see p. 10, n. 6, *supra*), and the preemptive impact of the Labor Act provided and still provide a clear barrier to providing benefits to striking employees who were refusing to work at their jobs.

29. Report of the Committee on Economic Security, as reprinted in hearings on S. 1130 before the Committee on Finance of the United States Senate, 74th Cong., 1st Sess. 1311, 1328 (1935).

30. This principle of governmental neutrality, although prohibiting subsidies in the instant case, applies equally well to employers. A state could not aid an employer during a labor dispute by subsidy or by requiring an unemployed individual to take work at a struck plant. The California Supreme Court in *Matson Terminals Inc.* v. *California Employment Commission,* 24 Cal. 2d 695, 707 (1944), stated the principle well in construing the California unemployment compensation law:

> The Act establishes a policy of neutrality in trade disputes by provisions that the payment or withholding of benefits should not be used to aid either party to a trade dispute. Thus, the provision disqualifying a worker who leaves his work because of a trade dispute § 56(a), is balanced by the provisions that *other unemployed workers* shall not be required to fill the vacated jobs or lose their right to unemployment insurance benefits. (§ 13(b)(1)). The payment of benefits to a claimant who leaves his work because of a trade dispute would conflict with this policy just as would the withholding of payments because a claimant refused to become a strike breaker. (Emphasis supplied.)



*Finally,* the fact that the availability-to-work requirement would normally be assumed to exclude striking employees is underscored by the history of the Food Stamp Act. Prior to 1971, food stamps were distributed to all needy persons even if they refused available work. Accordingly, strikers while not automatically eligible, could, like other persons, receive food stamps if they met cetrain need requirements. See Exhibit A hereto, a publicly available letter, dated May 24, 1968, from the Deputy Director Food Stamp Division, Dept. of Agriculture. In 1971, however, Congress required, for the first time, that, "as a condition precedent to obtaining stamps," able-bodied adults accept available employment. H. R. Rep. No. 91-1402, 91st Cong., 2nd Sess., *reprinted in* [1970] U. S. Code Cong. & Ad. News, 6025, 6035. An express waiver was then enacted so that strikers would not be precluded from receiving stamps by the then-new work availability requirements. See p. 24, n. 18, *supra.* By contrast, although the entire unemployment compensation system, at both the federal and state levels, is predicated on the assumption that recipients will actively search for work and accept work offered or available to them, no similar waiver with regard to recipients of unemployment compensation exists. The states, accordingly, are not free to make special accommodations for striking employees without a similar mandate by Congress.

c. The Court of Appeals relied on the silent death of certain bills which would have had the effect of curtailing the payment of unemployment compensation to strikers. Contrasted against the strong federal policy protecting the collective bargaining mechanism from state interference, the silent failure of scattered bills offers insufficient probative evidence from which a conclusion can be drawn that Congress elected to permit an exception to the federal labor scheme in this area.[31]

31. The Court of Appeals also relied upon a singie reference to the existence of a New York unemployment compensation law in a Congressional report. It cannot be inferred, however, from that

(Footnote continued on next page.)

The silent background of these bills is sharply distinguishable (1) from *N. L. R. B.* v. *Drivers Local Union No. 639*, 362 U. S. 274 or *Malone* v. *White Motor Corp.*, 98 S. Ct. 1185 (1978),[32] where there existed strong and clear Congressional history, (2) from the vigorous legislative debates before the Food Stamp

(Footnote continued from preceding page.)
single reference in the Senate Report that Congress was aware of either the particular labor dispute provision in that New York statute or the effect that specific provision would have on the federal collective bargaining scheme in 1935. That report contains no reference to the coverage of striking workers by the New York statute, but merely cites the legislation as an example of the variety of means of properly *funding* the insurance plans. The funding scheme was, at that time, the primary concern of Congress. See p. 23, n. 17, supra.

Further, Congress in 1935 was not legislating against a background of general striker eligibility for unemployment compensation arising from the exercise of state police powers. Compare *Munn* v. *Illinois*, 94 U. S. 113 (1877). Hence, there was no reason for Congress to reinforce the existing preemptive barrier formed by the recently enacted Labor Act. Prior to 1935 Wisconsin was the only state which had legislated an unemployment compensation system, but its operation was delayed and abandoned pending Congressional consideration of a federal system. See R. Hoar, *Wisconsin Unemployment Insurance* (1934); Larson and Murray, "The Development of Unemployment Insurance in the United States", 8 Vand. L. Rev. 181, 184-186 (1955). Although the New York statute was enacted on April 25, 1935, the taxing provisions of the statute did not become effective until January 1, 1936, and no benefits were paid out until January 1, 1938. N. Y. State Dept. of Labor, *A History of Unemployment Ins. Legislation in the United States and New York States* (December, 1973). Thus, since striking employees were not then eligible or actually receiving unemployment compensation benefits under state programs, Congress could not have been aware of the intrusion into the federal collective bargaining scheme that such payments would effect.

32. In *Malone* the Court was confronted with the question whether the States were precluded from regulating the vesting terms of a pension plan by the doctrine of labor law preemption, if it was embodied in a labor contract. Unlike the instant case no special accommodation was at issue since all employer pension plans were subject to the same requirements. In permitting the exercise of the contested state authority the Court relied on the *express* authorization for state action contained in Sections 10(a) and (b) of the Pension Plans Disclosure Act of 1958, 72 Stat. 997. An intensive

(Footnote continued on next page.)



Act was approved,[33] or (3) from the "special legislative history" behind Congress' decision "to suffer a medley of attitudes and philosophies on [a different] subject" in *Retail Clerks* v. *Schermerhorn*, 375 U. S. at 104-105. Here no similar decision was made "to abandon . . . [national] uniformity". *Ibid.* As the First Circuit stated, the legislative history in this area "is not sufficiently clear to establish" (*Grinnell Corp.* v. *Hackett*, 475 F. 2d at 454) that such a decision was made with regard to the state intrusion at issue here. The barriers which stymied the Court in *Grinnell*, however, no longer exist. The factual record presented below establishes the "missing causal link" (*Grinnell Corp.* v. *Hackett*, 475 F. 2d at 459)—the availability of benefits dramatically affects the collective bargaining scheme. In the light of this conflict, the disputed state policy must fall.

(Footnote continued from preceding page.)
legislative history immediately preceding the enactment of those statutory provisions corroborated the conclusion. Hence state regulation was permitted, as the congressional debates stated, "whether or not [the pension plan] had been brought into existence through collective bargaining." *Malone*, 98 S. Ct. at 1192. By contrast the Court of Appeals in the instant case relied on fragments of legislative history which were scattered in both terms of time and subject matter. See, *e.g.*, p. 23, n. 17, *supra*. Accordingly, it cannot be said, as in *Malone*, that "Congress clearly envisioned the exercise of state regulation power" (98 S. Ct. at 1195) over the balance of economic power underlying the collective bargaining process. As the First Circuit stated, the pertinent legislative history is at most "ambiguous." See p. 21, *supra*.

33. See 115 Cong. Rec. 26845-26890 (Sept. 24, 1969); 116 Cong. Rec. 41981-42035 (Dec. 16, 1970); 116 Cong. Rec. 42121 (Dec. 17, 1970); 116 Cong. Rec. 44163-44170 (Dec. 30, 1970); and 116 Cong. Rec. 44430-44443 (Dec. 31, 1970).

## CONCLUSION.

For each of the foregoing reasons, the Amici respectfully request that the save of the United States Court of Appeals for the Second Circuit be reversed.

Respectfully submitted,

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## APPENDIX A

UNITED STATES DEPARTMENT OF AGRICULTURE
Consumer and Marketing Service
Washington, D. C. 20250

May 24, 1968

Miss Linda Fredenberger
U. S. Chamber of Commerce
1615-H Street, N. W.
Washington, D. C. 20006

Dear Miss Fredenberger:

This is in response to your telephone inquiry about eligibility standards for the Food Stamp Program and the status of strikers.

The Food Stamp Act provides that the primary criterion of eligibility for participation in the program is "need," determined on the basis of family size and income. Under the Food Stamp Act, the State welfare agency is responsible for the certification of applicant food stamp families, using eligibility standards which have been proposed by the State welfare agency and approved by the Department of Agriculture. These standards include maximum net income limitations consistent with the income standards used by the State welfare agency in the administration of its Federally-aided public assistance programs. These standards also place a limitation on the resources to be allowed eligible households.

Families in which all members are receiving some form of welfare assistance are eligible to participate. Other low-income families may also be eligible if their income and resources do not exceed the established levels.

Thus, the family of a worker directly or indirectly affected by a labor dispute, work stoppage, or strike is not automatically eligible for food stamp benefits. Rather, it must be individually certified by the local welfare agency, using the established eligibility standards, to be in need of this food assistance. If the family is determined to be in need, there would be no basis for denying it participation in the program.

There is enclosed a table showing eligibility standards for a four-person household by State.

Sincerely yours,

/s/ JAMES E. SPRINGFIELD,
*Deputy Director, Food,*
*Stamp Division.*

Enclosure

Supreme Court, U. S.
FILED
JUN 12 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, *et al.*,
*Petitioners,*

v.

NEW YORK STATE DEPARTMENT OF LABOR, *et al.*,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE ON BEHALF OF STEPHEN R. HAVAS AND SUE HAVAS, URGING REVERSAL

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12 June, 1978

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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Stephen R. Havas and Sue Havas hereby respectfully move for leave to file the attached brief *amici curiae* in the instant case as provided for in Rule 42 of the Rules of this Court. Counsel for the petitioner, New York Telephone Company, and for the respondent, the New York State Department of Labor, have refused to consent to the filing of this brief, though requested to do so.

## INTERESTS OF THE AMICI CURIAE

Stephen R. Havas and Sue Havas are plaintiffs, with other New York Telephone Company (TELCO) employees, in a suit brought against TELCO, the Communications Workers of America (CWA), and other defendants. That case was filed on May 30, 1975 in United States District Court for the Northern District of New York,

sitting at Syracuse (Case No. 75-CV-268). The Havas' case is currently pending in discovery stages.

That case concerns the proper limits of the "agency shop" provisions of successive collective bargaining agreements their employer has had with CWA. The first of these resulted from the 1971-1972 illegal strike involved in the instant case. They are, therefore, vitally concerned that this Court not sanction New York's subsidization of CWA's illegal strike to obtain the first such agreement.

## ISSUES TO BE COVERED

At issue here is whether states, by applying their unemployment compensation laws to provide payments to strikers, can subsidize illegal and sometimes violent strikes in interstate commerce.

## CONCLUSION

Because the attached brief sets forth the interests of employees who are not represented by existing parties, and as it views the issues from a perspective different from that of the petitioners, with whom the *amici* would otherwise be aligned in seeking to have the judgment of the Court of Appeals reversed, this Motion should be granted.

Respectfully submitted,

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National Right to Work Legal Defense Foundation, Inc.
8316 Arlington Boulevard, Suite 600
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Attorney for Stephen R. Havas and Sue Havas

12 June, 1978



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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

---

## BRIEF FOR STEPHEN R. HAVAS AND SUE HAVAS AS AMICI CURIAE

---

## INTERESTS OF THE AMICI CURIAE

The interests of the *amici curiae* are described in the motion for leave to file which is submitted herewith.

## INTRODUCTION TO AND SUMMARY OF ARGUMENT

The Communications Workers of America (CWA), a labor organization in interstate commerce, struck the New York Telephone Company (TELCO), an employer in

interstate commerce, in July of 1971. That strike, sometimes violent and later determined to have been illegal under federal law, extended until mid-February of 1972. Over its course, following a statutory waiting period, the State of New York made payments to the striking employees under its Unemployment Insurance Law. The decision below sanctioned such payments made under those circumstances. The *amici* will show that federal regulation of the relationships of the employer, labor organization, and employees herein is pervasive, and that New York's payment of unemployment compensation benefits to strikers in interstate commerce violates Article VI, Clause 2, of the United States Constitution. That conclusion requires that this Court uphold the Constitution by reversing the decision of the Court of Appeals below.

## ARGUMENT

### The Employer, Labor Organization, Employee Relationships Are In Interstate Commerce and Regulated By The National Labor Relations Act, and Not State Law

Federal labor law, with its provisions for "exclusive representation,"[1] representation elections,[2] "union security,"[3] mediation services,[4] and strike notice requirements[5] pervades every aspect of the relationships among

[1] § 9(a) of the National Labor Relations Act (NLRA), 29 U.S.C. § 159(a).

[2] § 9(c) NLRA, 29 U.S.C. § 159(c).

[3] § 8(a)(3) NLRA, *as amended by* Labor Management Relations Act (LMRA), 29 U.S.C. § 158(a)(3).

[4] § 201 *et seq.* LMRA, 29 U.S.C. § 171 *et seq.*

[5] § 8(d) NLRA, 29 U.S.C. § 158(d).



CWA, TELCO, and TELCO's employees. From the beginning through the present, that law has been utilized and applied to those relationships by the parties themselves and by agencies of the federal government.[6] This body of law is found in the NLRA and not in any provision of the laws of New York State. The NLRA was enacted by Congress pursuant to the Commerce Clause,[7] and it rules here over any provisions of state law, by virtue of the supremacy of federal statutes set forth in Article VI, Clause 2, of the United States Constitution. To now permit the unemployment compensation feature of New York law to invade Congress' regulation of interstate commerce is, simply put, unconstitutional.

The pervasive extent of federal regulation of the employer, union, and employees involved here is demonstrated conclusively by the following indisputable facts.

The New York Telephone Company (TELCO) is a subsidiary of the American Telephone and Telegraph Company (AT&T), providing telephone service within the Bell System.[8] Two years are of concern here; in 1971 TELCO had operating revenues of $2,243,300,000, and in 1972, $2,620,089,000.[9] For labor relations purposes it is

[6] *See*, for example, Communications Workers of America (New York Telephone Company), 186 NLRB (No. 91) 625 (1970); Communications Workers of America (New York Telephone Company), 208 NLRB (No. 31) 258 (1974); Local 1104, Communications Workers of America v. NLRB, 520 F.2d 411 (1975), *enforcing* 211 NLRB (No. 18) 114 (1974); and Communications Workers of America v. New York Telephone Company, 327 F.2d 94 (1964).

[7] *See* § 1 NLRA, *Findings and Declaration of Policy*, 29 U.S.C. § 151.

[8] Standard & Poor's Register of Corporations, Directors and Executives, Volume 1, p. 1636 (1978).

[9] Respectively, *see* the Annual Reports of the New York Telephone Company for 1971 and 1972.

an "employer" in interstate commerce within the NLRA.[10]

In those years, TELCO had, among its employees, more than thirty-eight thousand in a bargaining unit of the "plant" and "engineering" departments. That unit was (and is) represented, for the purposes of collective bargaining with respect to "rates of pay, wages, hours, and other terms and conditions of employment," by the Communications Workers of America (CWA),[11] a labor organization in interstate commerce as defined in the NLRA.[12]

On several occasions since 1968 CWA's status as "exclusive representative" of unit employees has been challenged. Each time the NLRB has conducted elections pursuant to the NLRA's provisions to determine the wishes of a majority of unit employees with regard to representation. The Board's records reflect the results of those elections.[13]

The TELCO/CWA collective bargaining history precedes 1971. A succession of agreements includes the two relevant here, namely one pre-strike with a term from July 29, 1968-July 28, 1971 (Former Agreement) and one post-strike, entered February 16, 1972, but effective from July 18, 1971 through July 18, 1974 (Later Agreement). And there have been subsequent agreements as well.

The principal non-wage difference in the provisions of the pre-strike and post-strike agreements lies in the fact that the Former Agreement provides merely for "maintenance of

[10]§ 2(2) NLRA, 29 U.S.C. § 152(2); § 2(6) NLRA, 29 U.S.C. § 152(6).

[11]The Recognition section of each agreement so provides.

[12]§ 2(5) NLRA, 29 U.S.C. § 152(5).

[13]*See* proceedings in NLRB cases 2-RC-13142, 2-RC-14519, and 2-RC-15299.



membership," in which CWA membership was an employee option, whereas the Later Agreement requires that all bargaining unit employees, union members or not, pay dues, or a dues equivalent amount, to CWA as a condition of their employment with TELCO. These provisions exist under color of § 8(a)(3) of the NLRA.[14]

The Former Agreement was but one of a number of substantially similar "pattern agreements" CWA had with other AT&T subsidiary Bell System employers throughout the United States. All of these had the same expiration date, and all of them were subject to a nationwide strike CWA undertook against the several employers on July 14, 1971. That strike was settled, in all states but New York, on August 14, 1971. The resulting pattern agreements (Nationwide Agreements) retained the "maintenance of membership" provision of the Former Agreement but did not impose the "agency shop."

CWA continued the strike against TELCO until February 16, 1972. It changed only negligibly the employee compensation schedules found in the Nationwide Agreements; a CWA Vice President has termed the increase "kind of small."[15] The dominant difference between the two Agreements was the fact that the Later Agreement imposes the first agency shop CWA obtained from any Bell System employer.[16]

The February settlement was the result of a proposal by

[14]28 U.S.C. § 158(a)(3).

[15]Deposition of Morton Bahr, p. 41, dated February 23, 1978, on file in United States District Court for the Northern District of New York, sitting at Syracuse, Havas, *et al.* v. Communications Workers of America, *et al.* (Case No. 75-CV-268).

[16]*Id.*

J. Curtis Counts, then acting in his capacity as Director of the Federal Mediation and Conciliation Service, pursuant to the provisions of the Taft-Hartley amendments to the NLRA.[17]

The strike which led to the New Agreement was illegal under federal law. It had been held to be so by the National Labor Relations Board.[18] That determination by the Board has been recognized by the United States Court of Appeals for the Second Circuit in another case[19] and by the Trial Court herein.[20]

In addition to being illegal under the NLRA, the strike was also sometimes violent. Incidents of striker harassment of non-striking employees are documented. New York's criminal court records show dispositions in cases where striker violence against TELCO was charged. And newspaper articles and photographs demonstrate that such violent strike activity became generalized community knowledge.[21]

**Article VI, Clause 2, of The Constitution of The United States, As Followed in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Requires That The Decision Below, Permitting New York To Apply Its Unemployment Insurance Law To Subsidize a Strike in Interstate Commerce, Illegal Under Federal Law, and Sometimes Violent, Be Reversed**

---

[17]*Id.* at 44.

[18]Local 1101, Communications Workers of America (New York Telephone Company), 208 NLRB (No. 32) 267 (1974).

[19]Local 1104, Communications Workers of America, 520 F.2d 411, 413 n.2 (1975).

[20]New York Telephone Co. v. New York Dept. of Labor, 434 F. Supp. 810, 813 (1977).

[21]See materials included in the Appendix hereto.



These features of federal law have been applied, then, throughout the TELCO/CWA bargaining history. They are not new, nor are they limited in scope. In fact they have resulted in a federal agency indictment of the very strike in question as illegal. With this highly structured and applicable legislative scheme, it cannot be said that federal law does not dominate the labor-management relations of these parties in interstate commerce. The existence of these federal law provisions eliminates the claim, made and dismissed in *Gibbons v. Ogden*,[22] that Congressional inaction left these matters to the jurisdiction of the states.[23] For it has been consistently held that "in passing the National Labor Relations Act, Congress intended to and did vest in the [National Labor Relations] Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause."[24] Moreover, Congress' powers over interstate commerce are plenary. These factors show that New York's Unemployment Insurance Law cannot be used to subsidize a violent strike which has been declared illegal under federal law. The conflict between federal law and state subsidy could not be more stark. State law here must fall because the constitutional provision applied in *Gibbons v. Ogden*,[25] as it must absent amendment, remains the law of the land.

---

[22]22 U.S. (9 Wheat.) 1 (1824).

[23]The question was dismissed there, and should be here, because Congress has exercised its plenary power over interstate commerce, ". . . and the regulations Congress deemed it proper to make, are now in full operation." *Id.* at 200.

[24]NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963).

[25]It has been clear that "In every such case [where a state law interferes with or is contrary to acts of Congress], the act of Congress . . . is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." 22 U.S. (9 Wheat.) 1, 211 (1824).

## CONCLUSION

Article VI, Clause 2, of the Constitution of the United States requires that the decision below, permitting New York to apply its Unemployment Insurance Law to subsidize a strike in interstate commerce, illegal under federal law, and sometimes violent, be reversed.

Respectfully submitted,

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**APPENDIX TO BRIEF FOR STEPHEN R. HAVAS AND SUE HAVAS AS AMICI CURIAE**

**Reprint of New York Times Article, Sept. 14, 1971, p. 22, col. 3.**

## Phone-Strike Talks Here Are Halted by Accusations

Contract negotiations to end the two-month-old statewide telephone strike broke down after only a few minutes yesterday when the New York Telephone Company

accused strikers, for the third time in two weeks, of cable-cutting, other vandalism and of threatening working personnel.

Company representatives said they were prepared to resume talks today if the incidents were halted. Morton Bahr, area vice president of the Communications Workers of America, said there was "not one shred of evidence" that union members had engaged in such activities and said it was up to the company to reconvene the session.

The most serious of the weekend incidents listed by the company was the cutting of 10 cables at street-pole locations in Queens, affecting the service of 1,700 customers, mainly in Hollis.

The company also cited paint-smearing, egg- and tomato-throwing at work locations and phone calls threatening company officials.

**Reprint of Sunday News Article & Photographs, Nov. 28, 1971, p. C3.**

# Phonemen Decide to Stay on the (Picket) Line

**By Michael Patterson**

About 5,000 New York Telephone Co. craftsmen from Manhattan, Bronx and Brooklyn voted that their local continue their 19-week strike in a stormy and violence-marred meeting in the Felt Forum at Madison Square Garden yesterday.

The phonemen signified their decision to remain on strike by standing up after listening to Ricky Carnivale, president of Local 1101 of the Communications Workers of

NEWS photo by Leonard Detrick

**Philip Carr is ejected from Felt Forum meeting after attempt to speak against the union. Police said he filed a complaint.**

America, pledge to win "a great contract" at the bargaining table.

The boos and cheers were evenly mixed during the 90-minute rally, but many strikers afterward said they were confused by the voting procedure and were unaware that the vote was taking place.

### He's Dragged From Hall

*One phoneman, identified by police as Philip Carr, 42, of 40 W. 22d St., Deer Park, L.I., was dragged from the meeting hall by several men who, he said, knocked him to the ground, punched and kicked him.*

*Carr told police of the W. 35th St. station that he was seized by union marshals when he attempted to speak against the union. He required no medical attention, police said, but did file a complaint.**

In addition to castigating the phone company, the union men directed their anger at the CWA international union and its president, Joseph Beirne.

Many of the strikers demanded to know why the international had "sold out" and was not stopping the phone company from bringing in out-of-state foremen to handle equipment installations and repairs. When CWA representative Rolf Buckner attempted to explain, he was drowned out by booing.

"We will win a great contract," said Carnivale to cheers mixed with boos, "that will demonstrate that Local 1101 will lead the way—we will not be beaten."

### Rejected Pact in August

Carnivale accused the telephone company bargaining team of "not having the guts" to accept a union invitation to address the rally.

A spokesman for the phone company said the invitation

*Emphasis added.

NEWS photo by Leonard Detrick

**Ricky Carnivale, president of local 1101 CWA, talks with newsmen after pledge to win "a great contract."**

was refused because "Local 1101 is only one local and we bargain with all locals not just them."

Local 1101 and 22 CWA locals throughout the state voted Aug. 14 to reject a contract ratified by phonemen nationwide. The package called for a 33% pay hike over three years.

With over 15,000 members, Local 1101 is the largest in the state and therefore considered pivotal in regard to the negotiations. More than 30,000 phonemen are on strike throughout the state.

The negotiations aimed at settling the dispute have been greatly complicated by the initiation of President Nixon's economic controls and the 5.5% ceiling placed on wage

NEWS photo by Leonard Detrick

**Striking telephone workers during Felt Forum meeting yesterday.**

increases by the Pay Board.

Throughout the state, back-logged phone installations number about 210,000. Repair work has been maintained on an emergency basis by 12,000 management personnel.

"I came here with the notion that we were going to vote by secret ballot," said one 21-year-old telephone man after the meeting, "but this was nothing more than a farce—Ricky Carnivale conned us for 45 minutes, that's all that happened."



**Reprint of New York Times Article, Jan. 13, 1972, p. 45.**

# 6 Hurt and 8 Arrested as Phone Strikers Rampage in Midtown

**By Rudy Johnson**

At least six persons were reported injured and eight others were arrested yesterday when more than a thousand telephone workers, on strike for half a year, marched a winding course through midtown streets, overturning and smashing telephone company equipment along the way.

The injuries and arrests occurred in a series of scuffles with the police following a noontime rally in front of Governor Rockefeller's office here.

After leaving the Governor's office at 22 West 55th Street and swinging up Fifth Avenue for a block, the crowd—marching seven abreast and snarling traffic at intersections—moved east on 56th Street toward Second Avenue, where the first incidents occurred near a telephone company office.

There, several policemen, apparently angered when an egg was sent flying toward them and splattered at their feet, sailed into a knot of demonstrators. Daniel Keenan and Ricky Carnivale, president of Locals 1103 and 1101 of the Communications Workers of America, charged that one demonstrator had been knocked to the ground by a policeman's nightstick.

## Equipment Damaged

Three union members were arrested and placed in a nearby police van. Outraged by the arrests, many demonstrators surged down Second Avenue, damaging telephone company cables, tool trailers and other equipment at work sites.

As the men continued down Second Avenue, following a course that took them past two other phone company offices, they left a trail of three tool trailers overturned and windows smashed on at least two trucks and on several telephone booths. Also, a small white company car was overturned and a "scab" sticker was pasted on it.

Swinging north on Third Avenue, the union members—chanting "Ma Bell go to hell," and shouting obscenities that startled many onlookers—turned west on 42d Street, north again on Madison Avenue, and west again on 49th Street.

Units of the Police Department's special events squad followed. Motorcycle and foot patrolmen tried to keep the marchers on the sidewalks, but traffic was often blocked as the demonstrators spilled onto the streets along the route.

At one point, along Madison Avenue, three loaded police vans raced through the streets, sirens screaming, trying to get to key telephone company installations before the marchers did.

At the headquarters of Local 1101 in the Consulate Hotel, 224 West 49th Street, Mr. Carnivale climbed up on an overturned trash basket and told his followers:

"I've said it before and I'll say it again—you see what togetherness does. We're going to keep this up until we gain the respect of the stupid telephone company."

Mr. Keenan, who is also state chairman of the Communications Workers of America, said the group was marching to "demonstrate our disgust with the New York company's bargaining committee, our disgust with the Governor of New York " He asserted that Governor Rockefeller could intervene and "order" the telephone company to settle the strike.



**Strike in 27th Week**

The strike is now in its 27th week. The negotiations were in recess after weekend talks with J. Curtis Counts, director of the Federal Mediation-Conciliation Service. Other negotiators were said to be waiting in the Drake Hotel yesterday for resumption of the talks.

The strike against the New York Telephone Company started on July 14 as part of a nationwide walkout by more than 500,000 members of the companies. In most places the strike ended with a tentative agreement July 18 on the three-year contracts providing for wage increases of 32 per cent.

The 35,500 union members with New York Telephone, where top craftsmen were earning $193 weekly, held out for greater pay increases on the ground that they faced higher living costs.

**Reprint of New York Times Article, Jan. 15, 1972, p. 37.**

# Telephone Strikers Demonstrate Against Management Workers

**By Damon Stetson**

Striking telephone workers demonstrated again yesterday, protesting both what they called the company's failure to settle the six-month old dispute and the use of management personnel from other states to perform strikers' work.

Before dawn, more than 150 strikers set up picket lines in front of the Statler Hilton Hotel, at Seventh Avenue and 33d Street, where several hundred supervisors and plant foremen from other areas are living while performing

installation and maintenance work for the New York Telephone Company.

The pickets described the out-of-state employes as "scabs" who they contended were working here in violation of a city law forbidding the importation of strikebreakers. The company has argued, however, that it is utilizing normal sources of labor from other Bell System affiliates and that the law is unconstitutional.

"Stop pollution—send home out-of-town scabs," one of the picket signs said.

**Marched Through Midtown**

Shortly before 9 A.M. the pickets, their number increased to more than 400 by additional strikers, began a meandering march through mid-Manhattan with an escort of nearly 100 policemen, including four on horseback.

The strikers moved up Broadway, chanting, "Ma Bell, go to hell" and "Before we attack, send the scabs back." They zigzagged through the garment district to Ninth Avenue and then marched north to 42d Street. Heading eastward, they stopped at Eighth Avenue and sat down in the street, blocking traffic briefly, and they did the same at Seventh Avenue.

Two men were taken into custody by the police at the Avenue of the Americas and 42d Street, where a new telephone building is under construction. The police moved into the crowd of marchers as some banged their fists on a wooden fence surrounding the work site.

**Illegal Bullhorn Use**

Assistant Chief Inspector Raymond McDermott said one of the men seized would be charged with using a bullhorn without a permit. The other, he said, was trying to knock down the wall and would be charged with disorderly



conduct.

The marchers moved on to 330 Madison Avenue, between 43d and 42d Streets, where they concluded their demonstration by picketing an employment office of the telephone company.

Dennis Serrette, one of the leaders of the strikers, said that more demonstrations were being planned for next week.

Yesterday's march was completed without violence or property destruction. Last Wednesday, in another demonstration, pickets scuffled with the police, smashed windows and damaged telephone-company equipment along their line of march.

Neither union nor company sources reported any progress in negotiations. About 35,000 telephone craftsmen in locals throughout the state have been on strike since July 14—six months as of yesterday. They are seeking contract improvements beyond those that provided the basis for settlements in other Bell System companies.

**Reprint of New York Times Article, Jan. 16, 1972, Sec. 4, p. 3, col. 4.**

## Trouble on the Line

"Ma Bell, Go to Hell," chanted more than a thousand angry telephone workers as they went on a rampage through midtown Manhattan last Wednesday. After leaving a noontime rally outside Governor Rockefeller's 55th Street office, they snarled traffic, engaged in scuffles with police—

during which six persons were injured and eight arrested—and overturned and smashed telephone company equipment.

The men originally went on strike last July along with other Bell System craft workers throughout the country. Those outside New York quickly returned to work with a 32 per cent wage increase spread over three years, but the 35,500 telephone men in New York rejected that settlement and have been holding out for higher wages ever since because they say they face higher living costs. The rally and march last week were intended, said Daniel Keenan, state chairman of the Communications Workers of America, to demonstrate our disgust with the New York company's bargaining committee and our disgust with the Governor of New York." Mr. Rockefeller, he said, could "order" a settlement.



**Reprint of Daily News Front Page Banner Headline & Photograph, Jan. 13, 1972, p. 1.**

# Phone Strikers go on Rampage

NEWS photo by Paul DeMaria

**Fixing Ma Bell's Wagon? Phone company wagon at 40th St. is overturned by angry strikers during march up Third Ave. yesterday. On strike since July, some 3,500 phone workers rallied outside Gov. Rockefeller's office here at noon, then spilled out into violent demonstrations around midtown.**

**Reprint of Daily News Article & Photographs, Jan. 13, 1972, pp. 3, 8.**

# Phone Strikers Dial 'R' for Rampage

**By Fred Loetterle and Henry Lee**

About 3,500 striking telephone workers protested outside Gov. Rockefeller's midtown office yesterday noon and then, in an apparently spontaneous march that caught the police by surprise, rampaged for 2½ hours through midtown.

Chanting "Ma Bell, Go to Hell!," tossing firecrackers and waving defiant signs, they swept from 55th St. and Fifth Ave., east to Second, south to 37th St. and then doubled back uptown, finally dispersing at their own headquarters on W. 49 St., between Broadway and Eighth Ave.

As they marched and shouted, they overturned one phone company truck, damaged three other trucks, overturned three construction trailers at repair sites, damaged coin machines, shattered glass at phone headquarters on E. 37th St. and snarled auto and pedestrian traffic through the East Side.

One police sergeant, struck by a missile at 47th St. and Second Ave., was taken to Bellevue Hospital. Union sources reported that three marchers, including one man who suffered a broken leg, required hospital treatment. Three members of the press, two of them photographers from THE NEWS, were manhandled by the marchers.

### 10 Protesters Arrested

Ten protesters were arrested on charges ranging from rioting in the second degree to disorderly conduct.



Various downstate locals of the Communications Workers of America had planned to mark the six months of strike action by a rally outside Gov. Rockefeller's office at 22 W. 55th St. The union claimed a turnout of 5,000.

After half an hour of speech making, most of the union members suddenly swung up one block to 56th St., then moved east toward Second Ave., clashing with police outside a phone exchange at 228 E. 56th, between Second and Third Aves.

There had been only 30 to 40 cops on duty outside the governor's office. Deputy Inspector John Keenan, in charge of the police operation, called for reinforcements. A dozen mounted cops showed up, along with at least 20 scooter policemen, 100 men from the Special Events Squad, plus 50 regulars.

After the skirmish outside the phone facility, the marchers continued east to Second, then swept south to 37th. They wheeled west past the phone headquarters, shattering the glass on the main entrance in two places.

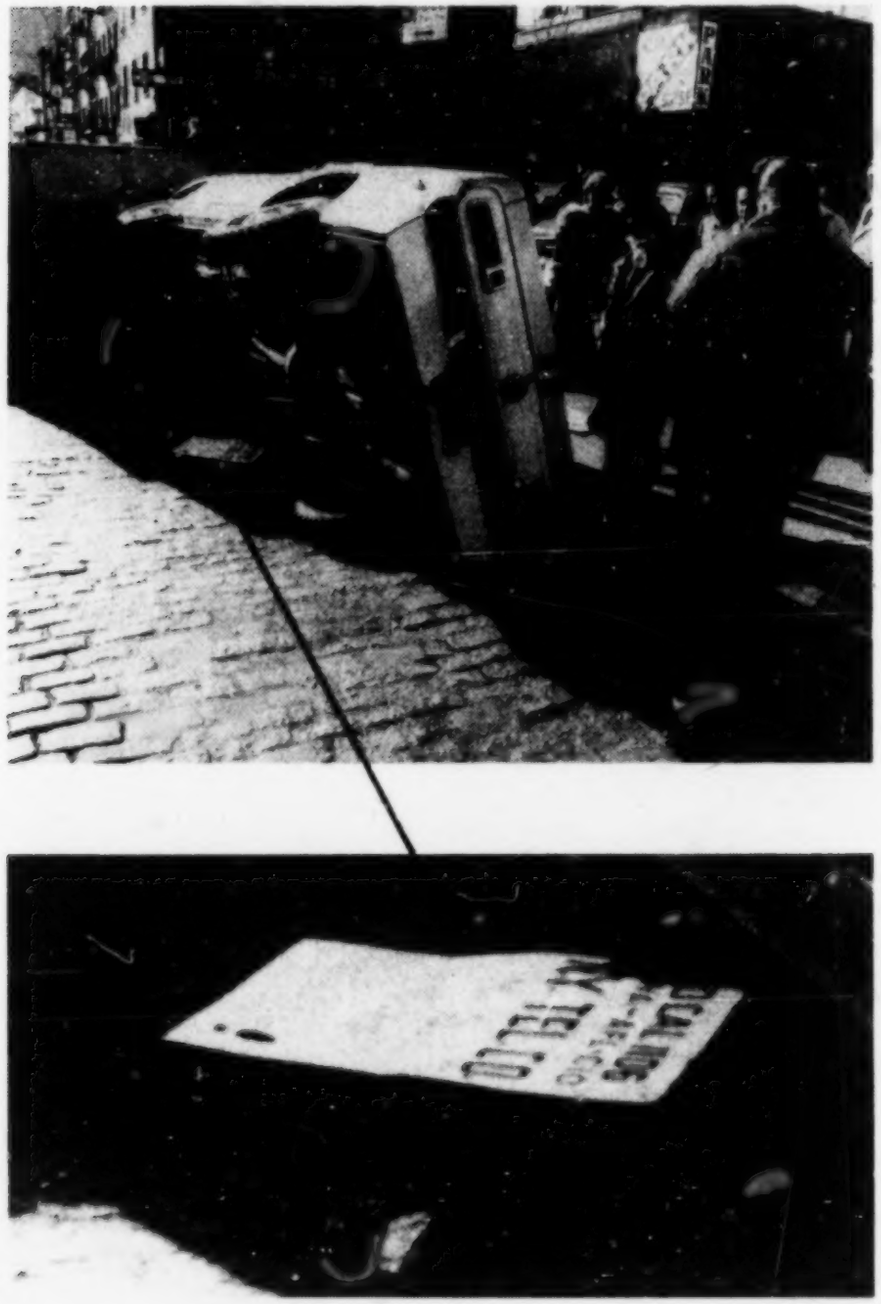
Despite police efforts to hold them to the sidewalk, they surged into the streets, doubled back north on Third Ave. and at 40th St., and knocked over a phone repair installation.

At 42d St., they headed west, still spilling into the road, but were briefly halted by the police about 100 feet east of Park Ave. With their leaders chivvying them, as well as the police, they took to the sidewalk, but soon were back into the street.

They turned north at Madison and shouting unprintable reflections on Ma Bell's sex life, proceeded to 49th St., where they turned west, continuing all the way to the Local 1101 headquarters at 224 W. 49th.

**Phone company car is overturned at 54th St. and Second Ave.**

NEWS photo by Paul DeMaria & George Mattson



NEWS photo by Paul DeMaria & George Mattson

**Mounted cop eyes demonstrators.**

Atop an overturned trash can, Ricky Carnivale, Local 1101 president, harangued them. In six months, he cried, the strikers had gained "the admiration of the entire labor movement," not to mention the "respect of the stupid

telephone company" and "the respect of the godamned public."

"We're going to keep this up!" he warned.

"Let's do it today!" the marchers cried. "Let's do it tomorrow! Let's do it next week!"

Danny Keegan, president of Local 1103, thanked the police—for which he was soundly booed by his fellow unionists. On safer ground, he shouted:

"There is nobody more militant than the New York Telephone Co. employees, and Ma Bell made us that way. Every scab, management included—they can all go to hell."

From the upper stories of the building, union employes leaned out windows, blowing New Year's horns and flashing obscene signs.

According to union strike coordinator Dennis Serrette, who made the march with his men, the protest was spontaneous. "This is what happens after six months of strike," added another union aide, Tom Schaefer.

The strike began last July 14 and in most areas ended July 18. But 23 New York State CWA locals narrowly voted rejection of a 33%, three-year contract which was adopted by other locals throughout the country. The thumbs-down vote was made against the recommendation of international officers.

Of the 35,000 still on strike in this state, 20,000 in Manhattan, Brooklyn and Bronx belong to Local 1101.

MOTION FILED
AUG 10 1978

In The

# Supreme Court of the United States

October Term, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

*—against—*

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, Jr., STATE COMMISSIONER OF TAXATION & FINANCE,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## MOTION FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL LAWYERS GUILD

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Printinghouse Press – Bar Ass'n Steno Serv. (Appeals Section) 212-687-0384

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, et al.,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF LABOR, et al.,

Respondents.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE

---

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the National Lawyers Guild (hereinafter the NLG) moves this Court for leave to file the accompanying brief as Amicus Curiae in support of the Respondents In support of the motion, the NLG shows as follows:

1. The NLG was established in 1937 as a bar association and has since its inception been dedicated to safeguarding and extending the rights of workers. Indeed, the preamble to the National Lawyer Guild's constitution as amended provides:

"STATEMENT OF PURPOSE

"The National Lawyers Guild is an association dedicated to the need for basic change in the structure of our political and economic system. We seek to unite the lawyers, law students, legal workers, and jailhouse lawyers of American in an organization which shall function as an effective political and social force in the service of the people, to the end that human rights shall be regarded as more sacred than property interests. Our aim is to bring together all those who regard adjustments to new conditions as more important than the veneration of precedent, who recognize the importance of safeguarding and extending the rights of workers, women, farmers, and minority groups upon whom the welfare of the entire nation depends, who seek actively to eliminate racism, who work to maintain and protect our civil rights and liberties in the face of persistent attacks upon them; and who look upon the law as an instrument for the protection of the people, rather than for their repression." (Preamble to the Constitution of the National Lawyers Guild, originally adopted on February 22, 1937, at Washington, D.C., and most recently amended in July of 1971 at Boulder, Colorado).



The Guild in furtherance of its aims, has established a National Labor Project for the purpose of promoting and defending the rights of workers. The National Labor Project is dedicated to the advancement of the interests of working people. The membership of the National Labor Project is made up primarily of attorneys who practice law on behalf of organized labor and workers committed to reforming and strengthening the labor movement. The experiences gained by the NLG and its member attorneys in promoting the interests of workers gives the NLG a unique vantage point from which to probe the practical and legal considerations relevant to determining whether New York's payment of unemployment benefits to strikers is pre-empted under the Supremacy Clause of the United States Constitution.

2. Because of its interest in issues pertaining to matters of great public import in the area of labor and public welfare, the NLG has sought and was granted permission by this Court to file briefs as Amicus Curiae in a number of cases over the last 30 years. See, e.g., American Communications Workers, CIO v. Douds, 339 U.S. 382; Regents of the State of California v. Balke, ___ U.S. ___ (decided June 1978).

3. The movant Amicus and its members have broad knowledge and experience concerning the doctrine of Federal Labor Preemption. The Amicus are uniquely situated to brief the Court on the practices as well as legal aspects of the issues herein. The attorneys

of counsel on this brief were the authors of the Amicus brief submitted to the Court of Appeals below in this matter on behalf of over 20 labor organizations. The voice of organized and unorganized labor as well as unemployed workers is not represented by the parties to the action. The interest of the State of New York in this action is not identical to that of organized and unorganized labor nor of the unemployed. The Guild stands in the unique position of being able to speak on behalf of all of these groups of workers in view of its historic advocacy of the rights of the employed as well as the unemployed.

4. Counsel for Petitioners have informed the Movant that they consent to the filing by the NLG of a brief as Amicus Curiae. A copy of the letter of consent is annexed to the Appendix to the Movant's brief.

5. Counsel for Respondents have informed the Movant that they oppose the filing by the NLG of a brief as Amicus Curiae. A copy of their letter of opposition is attached as an appendix to the Movant's brief.

WHEREFORE, it is respectfully moved that the NLG be granted leave to file



the accompanying brief Amicus Curiae in this case.

Dated:

New York, N.Y.
July 31, 1978.

Respectfully submitted,

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In The

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

# BRIEF AMICUS CURIAE OF THE NATIONAL LAWYERS GUILD

## Statement of the Case

This brief amicus curiae is submitted on behalf of the National Lawyers Guild in support of the respondents. The amicus interest of the National Lawyers Guild (hereinafter "NLG") is set forth in the motion annexed hereto.

The relevant facts, proceedings below and statutory provisions are set forth in the Petitioners' and Respondents' papers filed with this Court. The Court is requested, however, to take special note of



the following elements of the record:

1. The statistical materials adduced at trial demonstrate that the payment of unemployment benefits to strikers has no apparent effect on collective bargaining in New York. Thus, New York has a shorter average strike duration than the average for other states (A. 511, D. Ex. 113-a). With respect to the length of those strikes that would presumably reflect most clearly the receipt of benefits, i.e., those of more than eight weeks duration, New York is only sixth of the 50 states. Rhode Island, which maintains a similar statute, is twenty-ninth.

These facts are borne out by the collective experience of the National Lawyers Guild as attorneys for workers in labor disputes as well as the record below. Workers do not lightly engage in economic warfare with their Employer. It is rarely anticipated at the outset that a strike will last as long as eight weeks. Strikes which last in excess of eight weeks reflect particularly intractable bargaining issues and are not likely to be affected by the receipt of small amounts of money in the form of unemployment benefits.

2. One of the major areas of State concern behind the payment of unemployment benefits to strikers lies in preventing the economic dislocation to the communities in which strikers reside that might otherwise attend lengthy strikes. Mr. Harold Kasper, Director of the Unemployment Insurance Division of the New York Department of Labor, testi-

fied that in 1975, 2.2 billion "hot velocity" dollars were pumped into the State's economy in unemployment benefits. These dollars quickly circulated within the communities in which strikers reside. Indeed, some of them were no doubt used to pay monthly bills to Petitioners.

## I.

## CONGRESS HAS EXPRESSLY PERMITTED STATES TO PROVIDE UNEMPLOYMENT BENEFITS TO STRIKERS.

### A. Congressional Intent Must Be Determined by Reference to the Entire Spectrum of Legislation Which Touches the Area of Employee Benefits.

This Court re-emphasized in Malone v. White Motor Corp., 46 U.S.L.W. 4295 (Apr. 3, 1978) (No. 86-1184) that "the purpose of Congress is the ultimate touchstone" in determining whether state action is preempted under the supremacy clause, quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963). In Malone, supra, the Court upheld a pre-ERISA Minnesota statute which imposed liability upon an Employer for unfunded but vested employee pension benefits. The Employer unsuccessfully argued and the lower courts held that Minnesota thereby altered the terms the Employer achieved through collective bargaining. The Court avoided measuring Congressional intent solely by the terms of the National Labor Relations Act. The Court observed:



> " . . . [T]hat there is nothing in the NLRA, including those sections on which [the Employer] relies, which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining. If the [Minnesota] Pension Act is preempted here, the Congressional intent to do so must be implied from the relevant provisions of the labor statutes. We have concluded, however, that such implication should not be made here and that a far more reliable indicium of congressional intent with respect to state authority to regulate pension plans is to be found in §10 of the [Welfare and Pension Plans] Disclosure Act." 46 U.S.L.W. at 4297 (Emphasis in original.)

There can be no doubt that a similarly more reliable indicium of Congressional intent concerning the payment by states of unemployment benefits to strikers is to be found in the legislative history of the Federal Unemployment Tax Act, 26 U.S.C. §3301, et seq., as originally enacted and as amended.

### B. Congress Expressly Intended in Enacting and Amending the Federal Unemployment Tax Act to Reserve to the States the Determination of Whether to Provide Unemployment Benefits to Strikers.

The indications that Congress did not intend to preempt states from paying

unemployment insurance to employees involved in a work stoppage or lockout are primarily found in the legislative history of the Federal Unemployment Tax Act, 26 U.S.C. §§3301, et seq., as originally enacted, and as amended. Section 3304 of the Federal Unemployment Tax Act, 26 U.S.C. §3304, as enacted in 1954, was derived from Section 1603 of the Internal Revenue Code of 1939 which was, in turn, originally derived from the Social Security Act of August 4, 1935, Pub. L. 74-271, Title IX, 49 Stat. 639-45. Section 3304 of the 1954 Act provided for state plans for the payment of unemployment insurance benefits to be submitted to the Secretary of Labor for approval and specified certain circumstances under which the state could not disqualify a person from benefits.

Section 3304(a)(5), 26 U.S.C. §3304(a)(5) provides:

> "Compensation shall not be denied . . . for refusing to accept new work . . . if the position offered is vacant due directly to a strike, lockout or other labor dispute."

Similar provisions were included in the 1935 and 1939 derivative acts except that approval of the Social Security Board rather than the Secretary of Labor was required.

This Section indicates that Congress in 1935, as well as in 1954, in enacting the laws requiring states to provide unemployment benefits clearly considered the effect of unemployment insurance on



strikes and lockouts, and refrained from barring benefits to strikers. To the contrary, while Congress removed state discretion to deny benefits to persons who refuse a position vacant due to a strike, it left to the states the decision of whether or not to pay benefits to strikers.

The court below recognized that the failure of Congress to forbid the payment of benefits is illustrated by the fact that it had been requested to do so. Hearings on S. 1130 before the Senate Comm. on Finance, 74th Cong. 1st Sess. 128 (1935) (Edmund Witte, Executive Director, President's Committee on Economic Security, recommendation on behalf of Advisory Council); id. at 472 (Dr. Abraham Epstein, American Association for Society Security, proposed draft of bill); id. at 959 (statement of Noel Sargent, National Association of Manufacturers). The Senate Committee Report stated:

> "Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington."

S. Rep. No. 628, 74th Cong., 1st Sess. 13 (1935), reprinted in 1 Social Security, Documentary History of the Social Security Act of 1935 (1942), see H.R. Rep. No. 615, 74th Cong., 1st Sess. 8-9 (1935), reprinted in 1 Social Security

Documentary History of the Social Security Act of 1935 (1942). See New York Telephone Co. v. New York State Department of Labor, 566 F.2d 388, 392 (2nd Cir. 1978).

In 1977, the Federal Unemployment Tax Act was amended. In 1969, then President Nixon similarly sought to introduce into the proposed amendments before the 91st Congress a "requirement that [the] practice of paying unemployment insurance benefits to workers directly engaged in a strike be discontinued." Message from the President, 115 Cong. Rec. 18538 (1969). In reporting the bill to the House for passage, Wilbur Mills, Chairman of the House Ways and Means Committee, explained the reasons for the rejection of the President's proposal by stating:

> "We have tried to keep from prohibiting the States from doing the things the States believe are in the best interests of their people . . . for example, there are two States . . . which will pay unemployment benefits when employees are on strike. . . . [I]f the State wants to do it we believe they ought to be given latitude to enable them to write the program they want." 115 Cong. Rec. 34106 (1969).

Furthermore, the 1970 Amendments to the Unemployment Tax Act, 26 U.S.C. §3304, provided for explicit prohibitions upon states in providing unemployment insurance to certain categories of persons. The prohibitions include payment



to aliens who have not been lawfully admitted (26 U.S.C. 3304 (14)(A)) and payment to athletes during the off season (26 U.S.C. 3304 (13)(A)). The fact that Congress in these prohibitions did not include payment to strikers while knowing that for over 35 years such payments had been made by New York as well as other states indicates that Congress did not intend to prohibit payment to strikers.

Congress' intention that it was for the states to determine whether or not to pay benefits to strikers was made equally explicit in the Senate report on the Employment Security Amendments of 1970, S. Rep. No. 91-752, 91st Cong., 22, 1970 U.S. Code, Cong. and Adm. News 3606, 3627. In commenting upon the provisions of the amendments limiting a state's powers to cancel or reduce benefit rights, this Senate Finance Committee report stated:

> "It would not prevent a State from specifying the conditions for disqualification such as, for refusing suitable work, for voluntary quitting, for unemployment due to a labor dispute in the worker's plant, etc." (Emphasis supplied.)

C. The Legislative History of the Labor-Management Relations Act of 1947, 28 U.S.C. §141, et seq., Similarly Evinces Congress' Intent Not to Preempt States From Paying Unemployment Benefits to Strikers.

Although the primary legislation from which Congress' intent is to be ascertained regarding the payment of unemployment benefits to strikers is the Federal Unemployment Tax Act, the Legislative History of the National Labor Relations Act, 29 U.S.C. §151, et seq., similarly evinces Congress' intent not to preempt states from paying unemployment benefits to strikers. The original National Labor Relations Act "the Wagner Act") was enacted on July 5, 1935 as Pub. L. No. 74-198, 49 Stat. 449. Although the original act made no mention of unemployment compensation for strikers, the legislation was enacted by the same Congress which enacted the Social Security Act on August 14, 1935, Pub. L. No. 74-271, 531, Title IX, 49 Stat. 639-45. Thus, Congress had before it both the original labor relations act and unemployment insurance act at the same time.

The original unemployment insurance act contained in Title IX of the Social Security Act of 1935, Section 903(a)(5), the provision that a state could not deny benefits to a person who refused employment where the vacancy was due solely to a labor dispute or where the person was required to join a company union or refrain from joining a union as a condition of employment. Thus, Congress affirmatively considered the interrelation of labor-management relations and unemployment insurance in passing both the Wagner Act and Title IX of the Social Security Act in 1935. That same year, New York State enacted its unemployment insurance law which provides for the payment of benefits to strikers. The New York law was in fact enacted two months before



the NLRA and 4 months before the Social Security Act. Thus, a harmonious construction of the three statutes compels the conclusion that Congress did not intend to preempt states from paying unemployment benefits to strikers.

The LMRA ("Taft-Hartley Act") was enacted in 1947 (Pub. L. No. 80-101, 41 Stat. 136 (1947)). The final version of the Taft-Hartley act as enacted contained no references to unemployment insurance. However, the legislative history of Taft-Hartley indicates that the issue of precluding states from paying unemployment insurance to strikers was considered and rejected in favor of leaving the determination to the states.

H.R. 3020 (the "Hartley Bill") as reported to the House and as passed by the House, contained in the definition of employee under section 2(3) a provision which granted employee status to a striker unless (among other conditions) the striker "is receiving unemployment compensation from any state." See 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, 34. Thus, a striker who accepted unemployment insurance would no longer be considered as "employee" under the Hartley bill as reported to the house (H.R. 3020), and would thereby lose all rights under the Act because, as the House Committee on Education and Labor report on H.R. 3020 indicated, such payment of benefits to a striker was "a perversion of the purposes of the

social security laws." H.R. Rep. No. 245, 80 Cong., 1st Sess. 12 (1947), 1 NLRB Legislative History of the Labor Management Relations Act, 1947, 303. In conference, however, the provision was dropped. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947), 1947 U.S. Cong. Service 1135, 1137-39.1/

In commenting on this provision, the House Minority Report No. 245 on H.R. 3020, stated:

"The bill apparently intends

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1/ In the context of back pay awards, the Court has upheld the NLRB's long practice of treating unemployment compensation as an incidental benefit, not to be considered in computing such awards. National Labor Relations Board v. Gullett Gin Co., 340 U.S. 361, 365. In Gullett, the Court, referring to this House provision of the Hartley Bill which was rejected in 1947, added that the Board's practice regarding unemployment compensation was known to Congress when it enacted the Taft-Hartley amendments. "Under these circumstances, it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal [Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c))], Congress accepted the construction placed thereon by the Board and approved by the courts." Id. at 366. The same applies in the present context.



> to discourage States from paying unemployment compensation to strikers by penalizing employees who accept unemployment compensation. Under the Social Security Act, however, the determination of these matters was advisedly left to the States." Leg. Hist. of LMRA at 559, H.R. Rep. No. 245, 80th Cong., 1st Sess. 68, NLRB, Legislative History of the Labor Management Relations Act, 1947, 303 (1945)."

The reasoning of the minority report was apparently adopted by the conference committee. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32-35, 1947 U.S. Code, Cong. & Adm. News 1135, 1137-41, 1 NLRB, Legislative History of the Labor Management Relations Act of 1947, 536-39 (1948).

Perhaps the most compelling indication of Congress' intent not to preempt states from paying unemployment benefits to strikers is the fact that since 1935, Federal labor relations laws and federal social security laws have lived side by side with state laws, such as New York's, which allow the payment of unemployment benefits to strikers. This is especially true since both the labor relations laws and the unemployment insurance laws went

through numerous major amendments[2] without Congress acting to prohibit benefit payments to strikers (indeed the attempts to introduce such restrictions failed on each occasion as indicated above). Nor can it be argued that Congress was unaware of state laws which provided unemployment benefits

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2/ The NLRA was amended on June 23, 1947, Pub. L. 80-101, 61 Stat. 136 (Taft-Hartley); on September 14, 1959, Pub. L. 86-297, Title V, 73 Stat. 573 (Landrum-Griffin); and on July 26, 1947, Pub. Law 95-360, 88 Stat. 395. The Federal Ynemployment Tax Law as originally enacted as Title IX of the Social Security Act of 1935, was re-enacted in 1939 as part of the Internal Revenue Code, and was re-enacted on August 16, 1954 c. 736, 68 A Stat. 443 (Federal Unemployment Tax Act; which was amended on August 10, 1970, Pub. L. 91-373, Title I, 84 Stat. 699, 704, 707; on October 20, 1976, Pub. L. 94-566, 90 Stat. 2675, 2676; on November 12, 1977, Pub. L. 95-171, 91 Stat. 1353, and again amended on December 20, 1977, Pub. L. 95-216, Title IV, 91 Stat. 1561.



to strikers.[3] As early as 1947, when considering denying employee status to strikers receiving such benefits, the House Committee on Education and Labor reported in House Rep. 245, supra, at 12, 1 Leg. Hist. of LMRA at 303:

> "A few states pay strikers [unemployment compensation] after the fifth, sixth or seventh weeks. . . ."

Indeed, the Senate Report on the Social Security Act of 1935 named New York as one of the five states having a statute of the sort Congress encouraged other states to enact. S.Rep. No. 628, 74th Cong., 1st Sess., 1 Social Security Documentary history of the Social Security Act of 1935 (1942).

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3/ As the First Circuit noted in Grinnell Corp. v. Hackett, 475 F.2d 449, 454 (1st Cir. 1973), cert. denied, 414 U.S. 858 (1973):

> "In July 1933, the Federal Emergency Relief Administration (FERA) ruled that it would not 'attempt to judge the merits of labor disputes' but would treat unemployed strikers like all other unemployed persons for purposes of relief . . . This policy became a bone of contention during the textile strike of September 1934 . . . Congress could hardly have been unaware of this policy when in 1935 it passed in close succession both the National Labor Relations Act . . . Title IX of which . . . is now the Federal Unemployment Tax Act . . . [citations omitted]."

This Court has uniformly held that re-enactment of a statute by Congress in the face of judicial, legislative or administrative constructions of the law without amending the construction is persuasive of a legislative recognition and approval of the construction given. Chemaheuvi Tribe of Indians v. Federal Power Commission, 420 U.S. 395, 410 (1975); Georgia v. U.S., 411 U.S. 526, 533 (1973); C.I.R. v. Noel's Estate, 380 U.S. 678.

In this case, Congress amended both the labor relations acts and the unemployment insurance acts on numerous occasions. During each such occasion, it knew that New York and other states were paying unemployment benefits to strikers and that these state plans were approved by the federal agency then in charge.[4/]

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4/ The original act, Title IX of the Social Security Act of 1935, Section 903, provided for approval by the Social Security Board. The current Federal Unemployment Income Security Act, 26 U.S.C. §3304, requires approval by the Secretary of Labor. New York's law Ch. 468 was approved by both agencies and Congress was aware of such administrative approvals in enacting the various amendments.



Furthermore, this court has ruled that the construction of one act is particularly relevant to the construction given another act where both acts were enacted by the same Congress and both were designed to deal with closely related aspects of the same problem. U.S. v. American Building Maintenance Industries, 422 U.S. 271, 277 (1975). See also, Grinnell Corp. v. Hackett, 475 F.2d 449, 454 (1st Cir. 1973). As noted above, in this case, the fact that the same Congress enacted the NLRA and Title IX of the Social Security Act, with direct reference to labor disputes demonstrates that Congress considered the interrelationship of both statutes with respect to payment of benefits to strikers and chose not to prohibit states from making such payments.

D. Congress Has Also Permitted the Payment of Social Welfare Benefits to Strikers In Other Areas.

In other contexts, Congress has also indicated that the payments of social welfare benefits to strikers does not interfere with free collective bargaining. See the Railroad Unemployment Insurance Act (52 Stat. 1094, as amended, 45 U.S.C. 351, et seq.), and the Food Stamp Act (78 Stat. 703, as amended, 7 U.S.C. 2011, et seq.) which was amended in 1971 to prohibit states from denying food stamps to strikers, 7 U.S.C. 2014(c). Furthermore, Congress' stated reason for rejecting a provision denying such food stamp aid to strikers was its determination not "to take sides for labor disputes". H.R. Rep. No. 91-1402, 91st Cong., 2nd Sess. 11 (1970).

Petitioners anomalously argue that Congress' explicit refusal to allow states to deny food stamps to strikers indicates that Congress, in the case of unemployment benefits, intended the opposite. Such argument is fallacious as a matter of fact and logic. In the case of food stamps, Congress sought to proscribe states from denying benefits. As the legislative history above indicates, in the case of unemployment benefits, Congress chose to reserve to the states the determination as to whether benefits should be paid to strikers. In both cases, Congress' clear intention not to preempt states from providing social welfare benefits to its citizens who are on strike is evident.

E. This Court's Rulings Indicate that Congress In Enacting the Unemployment Tax Act and the NLRA And In Amending Those Acts Never Intended to Preempt the States from Paying Unemployment Benefits to Strikers.

This court, as well as lower courts, has reviewed the legislative history of the Federal Unemployment Tax Act and reached the conclusion that Congress did not intend to either compel or prohibit states from paying unemployment benefits to persons unemployed as a result of a labor dispute.

In Ohio Bureau of Employment Services v. Hodery, 431 U.S. 471, 97 S.Ct. 1898 (1977), the Court considered whether preemption barred an Ohio statute disqualifying workers from benefits if their unemployment was due to a labor dispute. The Court examined the Federal Unemployment



Tax Act and concluded that:

> "When Congress wished to impose or forbid a condition for compensation, it was able to do so in explicit terms. There are numerous examples . . . less related to labor disputes but showing congressional ability to deal with specific aspects of state plans. The fact that Congress has chosen not to legislate on the subject of labor dispute qualifications confirms our belief that neither the Social Security Act nor the Federal Unemployment Tax Act intended to restrict the States' freedom to legislate on this area."

See also, Kimbell, Inc. v. Unemployment Security Commission of the State of New Mexico, 429 U.S. 804 (1976).

Thus, the legislative history of both the National Labor Relations Act and the Federal Tax Unemployment Act leads to the inescapable conclusion that Congress in enacting both laws, as well as in amending them, intended to reserve to the states the determination of whether or not unemployment benefits should be paid to striking employees.

II.

UNDER TRADITIONAL LABOR PREEMPTION DOCTRINE STATES HAVE BEEN PERMITTED TO ACT IN AREAS INVOLVING THE WELFARE OF THEIR CITIZENS WHICH HAVE ONLY A DE MINIMUS IMPACT ON COLLECTIVE BARGAINING

For the past two decades, this Court has repeatedly considered the nature and scope of the Federal Labor pre-emption doctrine. At its broadest, Federal Labor Law has been held to pre-empt the exercise of State power over activities whih are arguably subject to Section 7 or 8 of the National Labor Relations Act. Lodge 76, International Association of Machinists, AFL-CIO v. Wisconsin Emp. Relations Comm'n, 427 U.S. 132, 138-39 (1976); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959). Despite, however, the acknowledged need to avoid potential conflict between Federal and State concerns in the area of labor relations, the Court "has been unwilling to declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions." Farmer v. United Brotherhood of Carpenters and Joiners of America, 430 U.S. 290, 295-96 (1977), quoting Motor Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971). In matters which would otherwise fall within the primary jurisdiction of the NLRB, the states have therefore traditionally been permitted to act in areas which affect the well-being of their citizens and which only tangentially affect federal labor policy.

As noted by this Court in Farmer, "In referring to decisions holding state laws pre-empted by the NLRA, care must be taken to distinguish pre-emption based on federal protection of the conduct in question . . . from



that based predominantly on the primary jurisdiction of the National Labor Relations Board . . . although the two are often not easily separable. Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 N. I9 (1969) 430 U.S. ____. In Sears Roebuck & Co. v. Carpenters, ___ U.S. ___, 98 S.Ct. 1745 (1978), the court further refined its definition of "primary jurisdiction" to refer to the "various considerations . . . which militate in favor of preempting state court jurisdiction over activity which is subject to the unfair labor practice jurisdiction of the Federal Board", 46 USLW 4446 N. 29. The Garmon line which stands upon the primary jurisdiction of the NLRB is, of course, distinct from those cases which turn upon an inquiry as to whether "Congress intended that the conduct involved be unregulated because left to be controlled by the free play of economic forces: NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)"; Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission, supra. It is submitted, however, that if local interests are permitted to withstand the far stricter Garmon scrutiny, then, a fortiori, New York's interest must be carefully weighed before it is abandoned in the wake of a merely inferred federal concern over state conduct which only tangentially influences the free play of economic forces.

In Farmer, this Court reiterated the principle that it would refuse to apply the pre-emption doctrine to activity that would otherwise fall within the area

of federal pre-emption if it was "merely of peripheral concern to the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of a compelling Congressional mandate, it could not be inferred that Congress had deprived the states of the power to act." 420 U.S. at 304 , citing Garmon. Farmer characterized this Court's prior pre-emption holdings as "reflect[ing] a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation." The Court stressed that:

> " . . . inflexible application of the [pre-emption] doctrine is to be avoided, especially where the state has a substantial interest in regulation of the conduct at issue and the state's concern is one that does not threaten undue interference with the federal regulatory scheme." 430 U.S. 302.

See also, Vaca v. Sipes, 386 U.S. 171, 180 (1968).

There are numerous areas which the Court has found to touch deeply rooted local interests and to concern only tangentially federal interests. See, e.g., Linn v. Plant Guard Workers, 383 U.S. 53 (1966) (malicious libel); Automobile Workers v. Russell, 356 U.S. 634 (1958) (mass picketing and threats of violence);



International Association of Machinists v. Gonzalez, 356 U.S. 617 (1958) (wrongful expulsion from union membership); Youngdahl v. Rainfair, 355 U.S. 131 (1957) (violence); Farmer v. United Brotherhood of Carpenters, supra (tort of intentional infliction of emotional distress). In each instance, the state was permitted to exercise tort claim jurisdiction because of the significant state interest in saving harmless its citizens and the relatively minor risk of interference with the federal scheme. The continuing vitality of those holdings was only recently confirmed by Sears Roebuck & Co. v. Carpenters, supra.

The Court below recognized that New York's provision of benefits to strikers grows out of the State's legitimate interest in the social and economic well being of its citizens, 566 F.2d at 393, n. 5. Indeed, payment of unemployment compensation traditionally has been viewed as an area of substantial local concern. As the Report of the Joint Legislative Committee on Unemployment asserted in 1931, "[W]elfare work and social relief has always been regarded as a local community problem." New York Legislative Documents, 1931 No. 112, p. 4. The State's interest in operating its unemployment compensation program is twofold. First, it seeks to further "broad humanitarian concerns" by alleviating the hardships suffered by unemployed workers and their families. See Ferarra v. Catherwood, 10 N.Y.2d 1, 217 N.Y.S.2d 11 (1961). New York State's Legislature set forth this concern in

1935, on enactment of the Unemployment Insurance Law:

> "Economic insecurity due to unemployment is a serious menace to the health, welfare and morale of the people of this State." N.Y. Labor Law §501 (McKinney 1977)

The second crucial concern of the State, inextricably linked with its humanitarian interest in mitigating the economic and socialdislocation suffered by the unemployed and his or her family, is its interest in maintaining the economic integrity of the affected community. As Harold Kasper, the Director of the Unemployment Insurance Division of the New York Department of Labor (in enumerating the objectives of the statute), testified at trial:

> "One, we play a definite role in cushioning the economy. In 1975, for example, we paid out, New York State alone, 2.2 billion dollars in benefits, all programs . . . This money is not saved. These are hot dollars, they are velocity dollars, they are spread out in the economy; they pay the butcher, baker -- I used to say candlestickmaker, but now I say the electric company, and I include the New York Telephone Company." (Transcript, p. 968)

New York's legislative scheme underscores its primary concern for the well being of its citizens. Although under



New York's Unemployment Insurance Law, persons who are separated from employment because of a "strike, lockout or other industrial controversy" are deemed to have "good cause" for their separation from employment, New York State Labor §583 (McKinney's 1977), they must wait seven weeks beyond the normal one week waiting period before they are eligible for benefits. New York Labor Law §592(2) (McKinney's 1977). The Court below acknowledged that New York's policy in that regard grows out of its legitimate concern for the well-being of its citizens. It should be understood that New York has not and does not attempt to strike a balance between the competing interests of management and labor. Rather, the balance is between New York's self-evident neutrality in the economic struggle and its professed aim of

safeguarding the welfare of its citizens. 5/

The additional seven week period of initial disqualification is extremely significant. New York has chosen to delay payment of benefits until it can legitimately be presumed that persons unemployed face a real need for such benefits. Moreover, the surrounding communities who depend upon the commerce otherwise generated by striking employees for their economic sustenance can additionally be presumed after an eight-week delay to require such aid.

Petitioners have demonstrated absolutely no appreciable impact upon the Federal scheme against which to balance New York's compelling interest.

The statistical data adduced at trial

5/ It can, of course, be argued that New York's initial suspension of benefits impermissibly tips the scales in favor of management. See, e.g., Sadallah v. KLM Royal Dutch Airlines, 53 A.D.2d 485, 386 N.Y.S.2d 228 (3rd Dept. 1976) in which the New York court held that:

"Many workers lose their employment during labor controversies as the innocent victims of events beyond their control and we do not perceive our system as having any reassurable impact on the side of organized labor or business. To the extent workers are subsidized, the initial suspension of benefits is clearly in favor of business."



fully supports the observation that New York's granting of benefits to strikers simply does not significantly impact on the collective bargaining process. Thus, New York has a shorter average strike duration than the average for other states (A. 511, D. Ex. 113-A). In a comparison of strikes which lasted more than eight weeks, New York is sixth out of the fifty states and Rhode Island, the only other state with a similar statute, is twenty-ninth (A. 512, D. Ex. 113-B). There is therefore no support in the record of the case for a claim that New York's payment of benefits to strikers has an appreciable impact on relative collective bargaining strength.

Accordingly, as the state is deeply concerned with the welfare of its citizens and as there is only a limited potential for interference with the federal scheme, the decisions of this Court clearly require that the doctrine of pre-emption be held inapplicable.

## III.

## PETITIONER'S RELIANCE UPON NASH v. FLORIDA INDUS. COMM'N RESTS ON A MISAPPREHENSION OF THE COMPETING STATE AND FEDERAL INTERESTS.

Petitioners' reliance upon Nash v. Florida Indus. Comm'n, 389 U.S. 235 (1967) as "standing four square against the holding below" (P. Brief 44) illustrates their failure to analyze the nature of the respective interests

involved herein. Nash concerned the right of an employee to file charges with the National Labor Relations Board without retaliation by the State in the form of a denial of unemployment benefits. Florida's interest was slight indeed - perhaps the protection of its treasury from those few who are unemployed and, in addition, file unfair labor practice charges. The federal interest, however, was overriding. Congress expressly demonstrated the importance it attached to maintaining a right of access by workers to the NLRB by devoting thereto an entire section of the Act (29 U.S.C. 158(a)(4)). The NLRB has consistently recognized that the prohibition contained in 29 U.S.C. 158(a)(4) is "a fundamental guarantee to employees that they may invoke or participate in the investigative procedures of [the] Board without fear of reprisal and is clearly required in order to safeguard the Board's processes." Filmation Associates, Inc., 227 NLRB No. 237 (1977) (emphasis added); see also, General Services, Inc., 229 NLRB No. 134 (1977). It is precisely because of the importance of this issue to the federal scheme that courts have adopted a "liberal" approach to this section, in order to fully effectuate its remedital purpose. NLRB v. Scrivener, 405 U.S. 117, 224 (1972), reh. den., 405 U.S. 1033 (1972).

Nash can hardly be said to support Petitioners' position. Congress has repeatedly approved the practice of paying unemployment benefits to strikers. Even if that were arguable,



Congress has clearly failed to expressly disapprove of the practice in the manner relief upon by the Court in Nash. Indeed, Nash lends additional weight, if any be needed, to the contention that state action in the area of social benefits is to be pre-empted only when it directly frustrates the accomplishment of an overriding Federal interest.

## Conclusion

For the foregoing reasons the judgment of the Court of Appeals below should be affirmed.

Respectfully submitted,

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June 29, 1978

Re: New York Telephone Co., et al. v. New York State Department of Labor, et al.
No. 77-961

Jerome Tauber, Esq.
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Dear Mr. Tauber:

We have received your letter of June 23, 1978 requesting our consent to the National Lawyers Guild's filing of a brief amicus curiae in the above referenced case.

We must advise you that we cannot consent to your participation in the litigation since the Guild's general interest as expressed in your letter is too remote from the specific issues in the case.

Very truly yours,

LOUIS J. LEFKOWITZ
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OUR FILE NO.
1187

June 27, 1978

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Re: New York Telephone Co., et al. v.
New York State Dep't of Labor, et al.
U.S. Supreme Court Docket No. 77-961

Dear Mr. Tauber:

Petitioners consent to your request to file a brief herein on behalf of the National Lawyers Guild as amicus curiae.

Very truly yours,

DLB:kc

FILED
AUG 11 1978
MICHAEL RODAK, JR., CLERK

No. 77-961

# In the Supreme Court of the United States

OCTOBER TERM, 1978

NEW YORK TELEPHONE COMPANY, ET AL.,
PETITIONERS

*v.*

NEW YORK STATE DEPARTMENT OF LABOR, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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# In the Supreme Court of the United States

OCTOBER TERM, 1978

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No. 77-961

NEW YORK TELEPHONE COMPANY, ET AL.,
PETITIONERS

*v.*

NEW YORK STATE DEPARTMENT OF LABOR, ET AL.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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### INTEREST OF THE UNITED STATES

The question presented in this case is whether the New York statute that provides unemployment compensation benefits to employees who are out of work because of "a strike, lockout, or other industrial controversy," N.Y. Labor Law § 592.1 (McKinney 1977), impermissibly interferes with the federal labor policy embodied in the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. 151, *et seq.* (NLRA).

Since the proper resolution of this question turns on the intent of Congress in enacting two major statutory programs that are administered by federal agencies—the NLRA and Title IX of the Social Security Act of 1935, 49 Stat. 639 [1]—the United States has a substantial interest in this case.

In an earlier case presenting a similar challenge to the unemployment compensation statute of a different state, the United States submitted a memorandum as *amicus curiae* expressing the view that the payment of unemployment benefits to striking workers is not in conflict with federal labor law. *Kimbell, Inc.* v. *Employment Security Commission of New Mexico*, No. 75-1452, appeal dismissed for lack of a substantial federal question, 429 U.S. 804. The United States believes that the same conclusion is warranted with regard to the New York statute challenged in this case.

## STATEMENT

On July 14, 1971, the Communications Workers of America, AFL-CIO (the "Union") commenced a nationwide strike against the Bell System in support of bargaining negotiations then in progress. On July 18, after an agreement was reached subject to employee ratification, the Union ordered all employees back to work. All employees returned to work except the approximately 38,000 employees represented by New York locals of the Union. These employees con-

[1] Title IX has been amended and recodified as the Federal Unemployment Tax Act, 68A Stat. 439, 26 U.S.C. 3301, *et seq.*



tinued on strike for an additional seven months (Pet. App. 5a-6a). After the strike had continued beyond the first eight weeks, the strikers became eligible for unemployment compensation benefits under the New York statute.[2] During the remaining five months of this strike, the striking employees received approximately $49,000,000 in benefits from the state's unemployment compensation funds (Pet. App. 24a).[3]

Petitioners then filed this action in the United States District Court for the Southern District of New York seeking, *inter alia*, a declaratory judgment that the New York statute, in providing for the payment of unemployment compensation to strikers, was contrary to the policy of federal labor law.[4] After a non-jury trial, the district court found that the state unemployment compensation benefits in fact influenced the willingness and ability of employees to continue the strike (Pet. App. 28a-38a). It further found that the employers' resolve to withstand the strike was affected by the fact that their unemployment insurance account was approaching

[2] N.Y. Labor Law § 592.1 permits employees who are out of work because of a "strike, lockout, or other industrial controversy" to collect unemployment compensation after a waiting period of eight weeks. The waiting period for those unemployed for other reasons is only one week.

[3] New York's unemployment insurance system is financed entirely by employer contributions (Pet. App. 6a).

[4] Petitioners also sought to recover payments made to the state's unemployment compensation fund and a restoration of the credits lost due to the payment of benefits to strikers (Pet. App. 24a).

a negative balance (Pet. App. 27a-28a). The court concluded that, by altering "the balance of power among competing forces," the New York law conflicts with the policy of free collective bargaining established in the federal labor laws (Pet. App. 42a, 43a). The court held that the state statute was therefor invalid under the Supremacy Clause of the United States Constitution (Pet. App. 54a) and issued an order enjoining enforcement of the New York statute "to the extent it provides for the payment of unemployment compensation to strikers" (Pet. App. 20a).

The court of appeals reversed. The court did not disturb the district court's finding that the New York law affected the balance of economic strength in the bargaining process. The court of appeals stated that "the crucial inquiry [is] whether Congress intended [this field to] be unregulated because [it was] left 'to be controlled by the free play of economic forces'" (Pet. App. 6a, quoting *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 140). Disagreeing with courts that have found only "ambiguous" expressions of a congressional intent to permit the payment of unemployment benefits to strikers,[5] the court of appeals found that the evi-

[5] See *Grinnell Corp.* v. *Hackett*, 475 F.2d 449, 454-457 (C.A. 1), certiorari denied, 414 U.S. 858; *Hawaiian Telephone Co.* v. *Hawaii Department of Labor and Industrial Relations*, 405 F. Supp. 275, 286 (D. Hawaii), appeals docketed, C.A. 9, Nos. 76-1584, 76-2056, certiorari prior to judgment denied, No. 77-962, March 27, 1978.



dence of congressional intent "is not 'ambiguous' but is relatively one-sided" (Pet. App. 7a). Reviewing the legislative history of the NLRA, the Social Security Act of 1935, and other relevant legislation, the court concluded (Pet. App. 16a-17a):

> [T]he question whether striking employees should be afforded unemployment compensation has been a significant political issue since the early 1930s. In 1935, at a time when Congress sought to encourage the States to enact unemployment compensation statutes, New York was in the forefront, and its law granted compensation to strikers. For over forty years, Congress has been aware of the issue in general, and of New York's program in particular. * * * [A]nd despite the otherwise broad preemptive scope of the federal labor laws, Congress has not expressed an intent to preempt State unemployment compensation laws that provide benefits to strikers. Quite to the contrary, it has evinced an intention to leave the States free to regulate in this area. Therefore, the conflict between New York's statute and the broad federal policy of free collective bargaining does not render the State statute unconstitutional. The conflict is one which Congress has decided to tolerate.

## ARGUMENT

### THE NEW YORK STATUTE PROVIDING FOR THE PAYMENT OF UNEMPLOYMENT COMPENSATION TO STRIKERS IS NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT

#### A. Introduction and summary

Under the New York unemployment compensation statute, striking workers who have been unable to obtain other employment are entitled to unemployment benefits after the expiration of an eight-week waiting period. The district court found that the availability of unemployment compensation to strikers under the New York law increased the ability of employees to carry on the strike and weakened the resolve of employers to withstand it.[6] On the basis of these express findings, we do not dispute the correctness of the district court's conclusion that the availability of unemployment compensation under the New York statute has altered the economic balance between the bargaining parties.

But this does not compel the further conclusion that the New York statute conflicts with, and is therefore precluded by, the federal labor law policy favor-

[6] In this respect, the case differs from *Kimbell, Inc.* v. *Employment Security Commission of New Mexico, supra.* In *Kimbell,* the state did not determine that strikers were eligible for benefits under the state unemployment compensation law until six months after the strike was over. The state benefits could thus not be said to have influenced the economic strength of the parties during the strike. See Memorandum for the United States as *Amicus Curiae* in *Kimbell, Inc.*, No. 75-1452, *supra,* pp. 9-10.



ing the "free play of economic forces." *National Labor Relations Board* v. *Nash-Finch Co.*, 404 U.S. 138, 144. Preemption is a doctrine designed to give effect to the congressional intent, and "[t]he purpose of Congress is the ultimate touchstone." *Malone* v. *White Motor Corp.*, No. 76-1184, decided April 3, 1978, slip op. 6; *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103. The determinative issue in this case is thus not whether the state law interferes with the otherwise free economic bargaining relationship between the parties, but whether the interference is permissible because it was within the contemplation of Congress. The essential inquiry is whether, in the precise context of unemployment benefits for striking workers, Congress "has occupied this field and closed it to state regulation." *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 146, quoting *Teamsters Union* v. *Morton*, 377 U.S. 252, 258.

The legislative histories of the NLRA and of the Social Security Act of 1935—enacted within a month of each other[7]—indicate that Congress, though aware

[7] The NLRA was enacted on July 5, 1935, and the Social Security Act on August 14, 1935. The former was debated in the Senate on May 14-16, 1935, and in the House on June 19, 1935. The latter was debated in the House on April 11-19, 1935, and in the Senate on June 14, 15, 17-19, 1935. Senator Wagner was a member of the Senate Committee which proposed each Act.

Title IX of the Social Security Act (now recodified as the Federal Unemployment Tax Act, 68A Stat. 439, as amended, 26 U.S.C. 3301, *et seq.*) established the participatory federal unemployment compensation scheme.

of the possible effect that unemployment compensation to strikers would have on the collective bargaining process, concluded that a uniform policy on the payment of such benefits to strikers was not essential to the federal regulatory scheme and thus left the matter to the judgment of each state. Indeed, the New York statute, which antedated the federal law, was reviewed by Congress and cited as an example of a permissible state unemployment compensation scheme. Furthermore, since enactment of the NLRA and the Social Security Act in 1935, Congress has rejected legislative proposals that were expressly designed to deter or preclude the states from paying unemployment compensation benefits to strikers. The court of appeals was therefore correct in concluding that, although the New York statute may affect the balance of power in particular labor disputes, this effect is one that "Congress has decided to tolerate" (Pet. App. 17a).[8]

[8] We do not suggest, however, that Congress afforded the states a blank check to enact any unemployment compensation provision they desire without regard to the demands of national labor policy. For example, in *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, the Florida unemployment compensation law disqualified an individual for compensation for any week in which he was unemployed "due to a labor dispute in active progress which exists at the factory * * * at which he * * * was last employed." The Florida Industrial Commission interpreted this provision to mean that the mere filing of unfair labor practice charges with the NLRB, alleging that employment was terminated in violation of the NLRA, created a disqualifying "labor dispute" within the meaning of the statute. This Court held that the State's construction of its law conflicted with the federal labor policy prohibiting retaliation or coercion of individuals who file charges with the NLRB. The Court thus concluded that the regulation "stood 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 240, quoting *Hill* v. *Florida*, 325 U.S. 538, 542. The regulation involved in *Nash* could not be said to be within Congress' contemplation as appropriate state action when it enacted the Social Security Act in 1935. As we show *infra*, however, New York's grant of unemployment benefits to strikers was within the express contemplation of Congress, and is therefore no "obstacle" to the effectuation of federal labor policy.



**B. The legislative history of the Social Security Act of 1935 shows that Congress was aware that unemployment compensation for strikers would affect the relative bargaining strengths of employers and employees but left the matter to the judgment of each state**

1. The Social Security Act of 1935 was enacted against a backdrop of massive unemployment. A primary concern of Congress in enacting the unemployment compensation provisions in Title IX of the Act was to ameliorate the adverse social and economic effects of this substantial involuntary unemployment. See H.R. Rep. No. 615, 74th Cong., 1st Sess. 8 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935). However, Congress also focused sharply on the need to protect the freedom of choice for each state in determining the balance to be struck in the distribution of economic benefits and burdens under the unemployment compensation system. The Senate Report stated that (S. Rep. No. 628, *supra*, at 13-14):[9]

> Except for a few standards which are necessary to render certain that the State unemployment

[9] See also H.R. Rep. No. 615, *supra*, at 8-9.

compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington. The States may or may not add employee contributions to those required from the employers. * * * Likewise, the States may determine their own compensation rates, waiting periods, and maximum duration of benefits. Such latitude is very essential because the rate of unemployment varies greatly in different States, being twice as great in some States as in others.

Under the bill, as we recommend that it be amended, the States will also have freedom of choice with regard to the type of unemployment compensation law they wish to enact. Three different types are represented in the five laws thus far enacted. In the New York and the Washington laws, there is a pooled unemployment insurance fund, in which all contributions are commingled and from which payments of compensation are made to unemployed workmen without reference to the employer for whom they work.

Utah and Wisconsin have unemployment compensation laws of the individual employer account type. In these laws the contributions of each employer are segregated, and payments of compensation therefrom are made only to workmen of these particular employers who become involuntarily unemployed. * * *

There are good arguments to be made in favor of each of these types of unemployment compensation laws. In accordance with the entire spirit of the Social Security Act, we believe that the Federal Government should not attempt to dictate to the States which type of unemployment



compensation law they should adopt. The amendment we suggest to the House bill will eliminate all such dictation and leave the States free to decide for themselves which type best suits their peculiar conditions.

The New York statute that was referred to and approved in the committee report provided for the payment of unemployment compensation to strikers.[10] Although the committee report does not refer to this specific feature of the New York law, and instead refers generally to the "freedom of choice" that is reserved for the states in enacting unemployment compensation laws (S. Rep. No. 628, *supra*, at 13), there is warrant for the assumption that Congress intended to allow the states freedom to experiment in the provision of such benefits to strikers. As the First Circuit noted in *Grinnell Corp.* v. *Hackett*, *supra*, 475 F.2d at 454:[11]

> In July 1933, the Federal Emergency Relief Administration (FERA) ruled that it would not

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[10] The other four state laws discussed in the Senate Report denied unemployment benefits to striking employees.

[11] In *Grinnell*, the First Circuit agreed that the legislative history of the Social Security Act could be understood "as indicating a broad Congressional intent not to preempt payments to strikers * * *." 475 F.2d at 457. The court found the congressional intent in this regard, however, to be less than "unambiguous." *Ibid.* The court therefore concluded that a congressional intent to protect the states' freedom of choice in the payment of unemployment benefits to strikers should not be implied. *Ibid.* But there is no reason to alter ordinary principles of statutory construction in determining whether Congress intended to permit the states to act independently in this case. If the congressional intent can be discerned, there is no basis for ignoring it because it is not "unambiguous."

> "attempt to judge the merits of labor disputes" but would treat unemployed strikers like all other unemployed persons for purposes of relief. Brown, Public Relief 1929-39, 270 (1940). This policy became a bone of contention during the textile strike of September 1934. Bernstein, The Turbulent Years: A History of the American Worker, 1933-41, 307 (1971).[12] Congress could hardly have been unaware of this policy when in 1935 it passed in close succession both the National Labor Relations Act, * * * and the Social Security Act, * * * Title IX of which * * * is now the Federal Unemployment Tax Act * * *.

Moreover, the Advisory Council to the Committee on Economic Security recommended to Congress that the "unemployment of persons directly engaged in trade disputes" not be covered under the unemployment

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[12] Bernstein recorded the events that occurred in 1934 (*id.* at 307-308):

> * * * [N]ewspapers across the nation announced that the federal government would underwrite the textile strike by giving relief to those who walked out. * * * The Illinois Manufacturers Association wrote [FERA Administrator] Hopkins through the newspapers that his policy imposed "an undue and indefensible burden upon . . . taxpayers" and was an invitation to "organized minorities" to "universal promotion of industrial warfare." H. H. Swift, a Columbus, Georgia, attorney representing textile interests, wrote the President that "the strike would never have been called . . . without the . . . financial support from the Federal Government." * * * Secretary of Commerce Roper, returning from a meeting of businessmen in Birmingham, reported great concern over federal feeding of strikers. He suggested with true southern gallantry that the President turn this question over to the States.



compensation provisions of the Social Security Act.[13] Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess. 228 (1935); Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess. 871, 885 (1935). Similar proposals were made by the American Association for Social Security and the National Association of Manufacturers. Hearings on S. 1130, *supra*, at 472, 959. Congress, however, chose not to impose any federal restrictions on the payment of unemployment compensation to striking employees. Instead, it followed the recommendation of the Report of the Committee on Economic Security that, since "considerable controversy has developed over the type of unemployment compensation legislation that should be enacted," including "the type of unemployment to be benefited," it was desirable to permit "considerable variation, so that we may learn through demonstration what is best."[14] Report of the Committee on Economic Security, Hearings on S.

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[13] By Executive Order No. 6757, June 29, 1934, President Roosevelt established the Committee on Economic Security, consisting of the Secretary of the Treasury, Attorney General, Secretary of Agriculture, Secretary of Labor, and the Federal Emergency Relief Administrator. Also established was an Advisory Council, whose members were to be appointed by the President. Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess. 224-225 (1935).

[14] In *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 130, this Court recognized that the "Social Security Act received its impetus from the Report of the Committee on Economic Security * * *."

1130, *supra*, at 1323. The legislation ultimately adopted by Congress is thus intended to permit "variations in State laws but insures uniformity in respects in which uniformity is absolutely essential." *Ibid.*

Consistent with this intent, Section 903(a) of the Act, 49 Stat. 640, provided that a state unemployment compensation law must meet only six specific requirements to qualify under the federal scheme.[15] The one requirement that relates to benefit eligibility [16] provides that

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[15] The Executive Director of the Committee on Economic Security explained that the

> Federal Act leaves to the decision of the states all questions relating to contributions and benefits; in fact, practically everything that is customarily included in unemployment compensation laws.
>
> There are, indeed, in Section 903(a), six conditions to which state laws must conform in order to be recognized for tax credit purposes under Title IX. These conditions, however, are, in the main, merely definitions of a genuine unemployment compensation act, not an attempt to secure uniformity throughout the country.

Witte, *An Historical Account of Unemployment Insurance in the Social Security Act*, 3 Law & Contemp. Prob. 157, 169 (1936).

[16] The other requirements for approval of the state plan were (i) that unemployment compensation must be paid through public employment offices in the state, (ii) that no compensation be paid with respect to unemployment occurring before the expiration of a two-year contribution period, (iii) that all money paid into the state unemployment fund promptly be paid over to the Secretary of the Treasury, (iv) that all money withdrawn from the unemployment trust fund by a state agency be used solely in the payment of compensation, and (v) that the state law provide that any rights,



> [c]ompensation shall not be denied * * * to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization * * *. [Section 903(a)(5) of the Act; 26 U.S.C. 3304(a)(5).]

Congress adopted these eligibility conditions for the very purpose of insuring "the compatibility of state unemployment compensation laws with the then brand-new labor statute." *Grinnell Corp.* v. *Hackett*, *supra*, 475 F.2d at 454-455. See Burns, *Unemployment Compensation and Socio-Economic Objectives*, 55 Yale L.J. 1, 17 n. 49 (1945).

Moreover, as the court of appeals noted (Pet. App. 12a-13a), the Social Security Board was empowered to review state unemployment compensation plans and to determine whether they were consistent with the conditions set forth in Title IX of the Social Security Act. Section 903(b) of the Act, 49 Stat. 640. The Board approved the New York unemployment compensation plan and the plans of three other

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privileges, or immunities conferred under it shall exist subject to the power of the legislature to amend or repeal the law at any time. Section 903(a)(1), (2), (3), (4), (6), 49 Stat. 640.

states also authorizing the payment of benefits to strikers. The Secretary of Labor, who is now responsible for certifying state laws on an annual basis, has consistently approved the New York law (Pet. App. 12a-13a). This consistent course of administrative conduct by the federal officials responsible for administration of the Social Security Act is entitled to great deference (see, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16; *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210).[17]

Accordingly, in *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 488-489, after reviewing the legislative history of the Social Security Act and the Act's specific eligibility conditions for benefits, the Court concluded that Congress intended to leave the states free to legislate on the subject of unemployment compensation for strikers. In *Hodory*, the Court rejected the claim that, in enacting the Social Security Act, Congress had intended to require the states to pay unemployment compensation to workers involuntarily unemployed due to labor disputes. The Court stated (431 U.S. at 488-489; footnotes omitted):

> [W]hen Congress wished to impose or forbid a condition for compensation, it was able to do so in explicit terms. * * * The fact that Congress has chosen not to legislate on the subject of

[17] While not dispositive with respect to questions under the NLRA, this settled administrative practice under the Social Security Act is inconsistent with petitioners' contentions under that Act (discussed above and at pp. 17-22, *infra*).



> labor dispute disqualifications [for unemployment compensation benefits] confirms our belief that neither the Social Security Act nor the Federal Unemployment Tax Act was intended to restrict the States' freedom to legislate in this area.

Since, in adopting the specific eligibility conditions in Title IX of the Social Security Act, Congress made a considered choice not to "impose or forbid" a requirement that states are not preempted but are left free "to legislate in this area." *Ibid.*

2. Nor is there merit in petitioners' contention (Br. 46-47) that, even if Congress did not expressly exclude strikers from eligibility for benefits, its intent in that regard may be assumed from the focus of the legislation on the problem of involuntary unemployment. While a primary concern of the unemployment compensation provisions of the Social Security Act was the needs of "workmen who lose their positions when employment slackens" (S. Rep. No. 628, *supra*, at 11), Congress did not adopt the suggestion of the Advisory Council that eligibility for benefits be restricted to the involuntarily unemployed. See p. 12, *supra*.[18] Rather, for the reasons expressed in

[18] State laws vary considerably in providing benefit eligibility for persons who quit their jobs voluntarily or are discharged for cause. Some states provide benefits without qualification while others deny, delay, or reduce benefits. See United States Department of Labor, *Comparison of State Unemployment Compensation Laws*, Table 401, 4-27, Table 402, 4-31 (January 1978).

The Senate Report states in passing that "[p]ayment of compensation is conditioned upon continued involuntary unem-

*Hodory, supra*, 431 U.S. at 488-489, this was another matter that was left to the judgment of the states.[19] See also *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 518-519 (upholding the Alabama unemployment compensation scheme that extended benefits to persons other than the involuntarily unemployed).

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ployment." S. Rep. No. 628, *supra*, at 11. *Amici* Dow Chemical, *et al.*, assert (Br. 24) that "[t]he underlying assumption was that a worker would take available work * * *." Under the New York law, however, strikers must be available for and accept suitable employment if offered. Contrary to *amici's* assumption, strikers are not unavailable for employment merely because they are on strike. Many strikers seek and accept interim employment during a strike. Section 903(a)(5)(A) of the Act, however, makes clear that the states may not deny eligibility to a worker who refuses to accept a position that "is vacant due directly to a strike, lockout, or other labor dispute." 26 U.S.C. 3304(a)(5)(A).

[19] *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, does not require a different conclusion. There the Court struck down a provision of the California unemployment compensation law that withheld benefits pending appeals of eligibility determinations. The Court concluded that the State provision violated the express command of the federal law requiring that unemployment compensation be paid when due. *Id.* at 129-130, 135. In so concluding, the Court stated: "The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee." *Id.* at 130. However, the Court also noted that Congress viewed unemployment compensation as a means of maintaining purchasing power and of minimizing the necessity for welfare payments. *Id.* at 131-132. Whatever Congress' objectives may have been in enacting the Social Security Act, it did not consider it necessary, in order to accomplish those objectives, to require the states to limit their unemployment systems to the involuntarily unemployed.



Petitioners also claim (Br. 48) that the model state laws drafted by the Social Security Board in 1936 contained a provision which "expressly denied benefits to strikers." They contend that this provision reflected a congressional intent that strikers not be eligible for unemployment benefits. The Draft Bills, however, were

> merely suggestive and * * * intended to present the various alternatives that may be considered in the drafting of state unemployment compensation acts. Therefore, they cannot properly be termed "model" bills or even recommended bills. This is in keeping with the policy of the Social Security Board of recognizing that it is the final responsibility and the right of each state to determine for itself just what type of legislation it desires and how it shall be drafted.

*Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types*, Social Security Board, Washington, D.C. (January 1936).[20] In any event, the Draft Bills did not expressly deny benefits to strikers. Rather, they included a provision modelled on the British Unemployment Insurance Act that disqualified an individual unemployed as the result of a labor dispute that has caused a "stoppage of work." This term is interpreted by British decisions and by a majority of the states to mean a curtailment of work at the employ-

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[20] See also *Ohio Bureau of Employment Services* v. *Hodory*, *supra*, 431 U.S. at 485, where the Court stated that it was "most reluctant" to give the Draft Bills any weight in construing the Social Security Act.

ing enterprise and not a cessation of work by individual employees. Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. Chi. L. Rev. 294, 308 (1950); Annot., *Unemployment Benefits—"Stoppage of Work,"* 61 A.L.R. 3d 693, 697-704, 705 (1975). See Hughes, *Principles Underlying Labor-Dispute Disqualification*, Attachment to Unemployment Compensation Program Letter No. 000, Social Security Administration, p. 26 (July 1946). Accordingly, even under the Draft Bills a striker could obtain unemployment compensation if the strike did not result in a substantial curtailment of the employer's operations.

Petitioners further contend (Br. 50) that, even if Congress were aware of and approved the benefit provisions of the New York unemployment compensation statute in 1935, Congress could not have contemplated the impact that the New York payments currently have on the collective bargaining process. Petitioners rely particularly on the fact that New York's experience rating system [21] was not in ex-

[21] The Act allows an employer a credit against the federal unemployment compensation tax if the state has lowered the employer's contribution rate on the basis of not less than three years of "experience with respect to unemployment or other factors bearing a direct relation to unemployment risk." 26 U.S.C. 3303(a). All of the currently existing state unemployment compensation laws have some type of experience rating system. The New York system, which employs a "reserve-ratio" formula, is similar to those in 31 other states. *Comparison of State Laws, supra*, note 18, pp. 2-4, 2-5, sec. 220.01. The reserve ratio formula seeks to maintain an even balance between payments made into the fund by the employer and benefits paid out of the fund to the employer's workers (see Pet. App. 6a, 27a-28a).



istence in 1935 and that the rating system has substantially increased the economic leverage that unemployment compensation gives to striking workers (Br. 50-51). Petitioners have overlooked the fact, however, that the Social Security Act included a provision designed to encourage states to adopt experience rating systems. See 26 U.S.C. 3302(b); S. Rep. No. 628, *supra*, at 14. The State's adoption of such a system was therefore plainly within congressional contemplation in 1935. See also *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365.[22]

Finally, there is no merit in petitioners' contention (Br. 48-49) that a congressional intent to preclude the states from paying unemployment benefits to strikers is evidenced by the fact that, in enacting an unemployment compensation statute for the District of Columbia in 1935, Congress made striking workers ineligible for these benefits.[23] In enacting the District of Columbia law, Congress was acting in a capacity similar to that of a state legislature. It does not follow from the choice made by Congress in its capacity as a local lawmaker that Congress in-

[22] Petitioners also point out (Br. 50) that the initial waiting period for strikers under the New York law was 10 weeks instead of eight weeks, and that both the amount of benefits and their duration have increased. However, these changes merely reflect the fact that wages and living costs have increased since 1935. They do not alter the basic scheme of the New York unemployment compensation system.

[23] The District of Columbia Unemployment Compensation Act, 49 Stat. 946, as amended, 46 D.C. Code 301, *et seq.*, denies benefits to any individual unemployed as a result of a "labor dispute still in active progress." 46 D.C. Code 310(f).

tended to mandate the same policy judgment for each of the states. On the contrary, as we have shown above, Congress considered it appropriate to leave the states free to address the difficult substantive question whether, in the context of each state's needs and judgment, unemployment benefits should be provided to striking workers.

**C. The intent of Congress to permit each state to determine whether strikers should receive unemployment compensation is confirmed by the history of subsequent legislation**

Following the enactment of the NLRA and the Social Security Act in 1935, Congress has considered and rejected legislative proposals that would have deterred or precluded the states from paying unemployment compensation to strikers. In 1947, the Hartley Bill was passed by the House; it provided that a striker who accepted unemployment compensation would no longer be considered an "employee" under the National Labor Relations Act (H.R. 3020, 80th Cong., 1st Sess., Section 2(3) (1947)), and thus would lose all rights under that Act. The House Report indicates that this provision of the Hartley Bill was motivated by the concern that the payment of unemployment compensation to strikers was "a perversion of the purposes of the social security laws." H.R. Rep. No. 245, 80th Cong., 1st Sess. 12 (1947). The Minority Report, however, stated that "[u]nder the Social Security Act * * * the determination of these matters was advisedly left to the States." *Id.* at 68. The Senate version of the legislation omitted



this provision of the Hartley Bill, and the Senate version was accepted in conference without explanation. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32-33 (1947).

In 1969, the House rejected President Nixon's proposal that strikers be excluded from eligibility for unemployment compensation. House Committee Chairman Wilbur Mills explained:

> We have tried to keep from prohibiting the States from doing the things the States believe are in the best interest of their people. * * *
>
> For example, there are two States * * * which will pay unemployment benefits when employees are on strike * * *. * * * [I]f the State wants to do it we believe they ought to be given latitude to enable them to write the program they want. [115 Cong. Rec. 34106 (1969).][24]

---

[24] When Congress has chosen to set federal standards governing the availability of benefits for strikers, it has done so expressly. The Railroad Unemployment Insurance Act (52 Stat. 1094, as amended, 45 U.S.C. 351, *et seq.*) provides that only participants in unlawful strikes may be denied unemployment benefits under that Act. 45 U.S.C. 354(a-2) (iii). Congress amended the Food Stamp Act in 1971 (84 Stat. 2049) to prohibit states from denying food stamps to strikers. 7 U.S.C. 2014(c). In doing so, Congress rejected the proposal that such aid be denied to strikers because it did not want "to take sides in labor disputes." H.R. Rep. No. 91-1402, 91st Cong., 2d Sess. 11 (1970). On the other hand, Congress has left the states free to determine whether benefits under the Aid to Families with Dependent Children Program, 42 U.S.C. 606, may be denied to the children of participants in a labor dispute. *Batterton* v. *Francis*, 432 U.S. 416. See also *Super Tire Engineering Co.* v. *McCorkle*, 550 F.2d 903 (C.A. 3), certiorari denied, 434 U.S. 827, in which the court rejected the contention

Petitioners (Br. 53) cite the maxim that the views of a subsequent Congress have little relevance to the determination of the intent of an earlier Congress. However, as the Court noted in *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365-366, the action or inaction of a subsequent Congress is relevant to the question whether Congress is satisfied that a law is being properly interpreted and applied. This is particularly true with regard to the Social Security Act. The unemployment compensation system recommended by the Committee on Economic Security and adopted by Congress was designed to promote experimentation in almost every regard by the states. See p. 13, *supra*. The Committee was aware, however, that the freedom afforded the states could lead to results that Congress might ultimately disapprove. It therefore suggested that (Hearings on S. 1130, *supra*, at 1323):

> [s]hould these fears expressed by the champions of a federally administered system prove true, it is always possible by subsequent legislation to establish such a system. We recommend that it be expressly provided in the Federal act that all States must include in their statutes provisions to the effect that those acts shall not be deemed to create any vested interests preventing modification or repeal and that a similar reservation of power be made by the Federal Government. Accordingly, the Congress can at any time increase the requirements which State laws must fulfill and may, if it sees fit, at some future time, substitute a federally administered system for the cooperative Federal-State system we recommend.

Congress adopted this recommendation by enacting Section 903(a)(6) of the Act, 49 Stat. 640, which provided that "[a]ll the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time." It is therefore reasonable to conclude, as Representative Mills has confirmed, that when Congress rejected the proposals to deter or preclude the states from providing unemployment compensation to strikers, Congress was expressing an affirmative intent that the states are to remain free to exercise their independent judgment on this complex matter of social policy.[25]

---

that New Jersey's policy of paying welfare benefits to strikers was in conflict with national labor policy.

[25] It is unnecessary to determine in this case the ultimate scope of the states' freedom to make payments to strikers that may intrude on or disrupt the collective bargaining process. See note 8, *supra*. For example, a statute requiring an employer to pay its employees—through the state unemployment compensation system—100 percent of wages from the beginning of a strike to the end would appear to be so far beyond the focus of the Social Security Act and so destructive of the principles of the NLRA as to be beyond the contemplation of Congress in permitting some freedom of choice to the states. The New York statute, however, is clearly not in this category.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1978.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 271241 94

Supreme Court, U.S.
FILED
AUG 15 1978
MICHAEL RODAK, JR., CLERK

No. 77-961

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),
*Petitioners,*

vs.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE NEW YORK STATE AFL-CIO AS AMICI CURIAE

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),
*Petitioners,*

vs.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE NEW YORK STATE AFL-CIO AS AMICI CURIAE

The brief amici curiae is filed with the consent of the parties, as provided in Rule 42 of the Rules of this Court.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners in this case rely heavily on the findings of fact made by the District Court, after a lengthy trial, concerning the impact of unemployment compensation benefits on the labor dispute between petitioners and CWA. Respondents set forth contrary evidence on this impact question, evidence which indeed would have justified, and may have required, opposite findings. And, *amici* Dow Chemical Co. et al. and Rochester Telephone Co. et al. set forth facts concerning the alleged impact of unemployment compensation benefits upon other labor disputes, those in which the *amici* employers were involved.

The Court of Appeals in this case, however, regarded the question of the precise impact of New York's unemployment compensation law, or of any other state's law, upon a particular labor dispute, or upon labor disputes generally, as irrelevant. Instead, it treated the question as one involving solely a question of Congressional intent, and therefore as a question which is not to be resolved by a trial.

In this respect, the Court of Appeals rejected the approach of *Grinnell Corp. v. Hackett,* 475 F.2d 449. In that case, the First Circuit, believing that "unambiguous Congressional intent [is] lacking" (*id.,* at 457), ordered a trial on the questions first, whether the payment of unemployment benefits to strikers after a period of disqualification constitutes a "palpable infringement" on federal labor policy (*id.,* and second, whether, if so, the state's interest outweighed



that of the federal government. The Second Circuit in this case declined that approach because:

> "Here, as in most pre-emption cases, a positive expression of congressional intent is lacking, and the Court must resort to the drawing of inferences. In the instant case, the evidence upon which those inferences must be based is relatively one-sided." (566 F.2d 388, 391).

The Second Circuit's opinion on the merits amply bears out that conclusion, as we develop in Part II of the Argument.

I. First, however, in Part I, we explain that even if the question of Congressional intent were as close as the *Grinnell* court thought it to be, that court's method for answering it would be unsound. For, as this Court's recent opinion in *Malone v. White Motor Corp.,* ..... U.S. ....., 46 U.S.L.W. 4295, stresses, in pre-emption cases, "the purpose of Congress is the ultimate touchstone." (*Retail Clerks v. Schermerhorn,* 375 U.S. 96, 103). And, in determining that intent, it is the obligation of courts to "reconstitute the gamut of values current when the words were uttered." (Letter from Judge L. Hand, quoted in Lesnick, *The Gravamen of the Secondary Boycott,* 62 Col. L. Rev. 1363, 1393-4 n. 155). This approach, rather than either a battle of experts or a quest for explicit statutory resolution of the asserted conflict between national labor policy and a particular state statute, was the method which was used in *Malone,* and which must be used here.

In Part I(B), we discuss the contention that this Court's decision in *Nash v. Florida Industrial Com-*

*mission*, 389 U.S. 235, demands reversal of the decision below. We show that *Nash* involved a situation in which the federal policy vindicated—access to federal remedies—was one as to which there is indeed a presumption favoring pre-emption. Moreover, *Nash* would be pertinent only if we were relying solely on the general permission granted states under the Social Security Act to set eligibility standards, rather than on that permission couplied with the compelling evidence, reviewed in Part II, that Congress considered this *particular* problem and determined to include it within the general permission granted.

II. In Part II, we survey the legislative materials, including both those relied upon below and others. First, we demonstrate that the structure of the Social Security Act designedly left to the states all questions concerning eligibility for unemployment compensation benefits, except for a few federal standards included in Section 903 of the Act. Given this structure, it is indeed not surprising that there is no explicit permission granted to the states to pay benefits to strikers. The statutory scheme was such that only prohibitions, and not permissions, had to be spelled out.

Second, we show that Congress was specifically aware in 1935 that the question of the relationship between unemployment benefits and the nascent national labor policy would have to be faced. Congress, however, determined to resolve this question only partially, through the few substantive protections contained in Section 903. The larger question of benefits for strikers Congress declined to address, despite the



fact that the draft bill suggested to the states by the Committee on Economic Security which advised the legislation dealt with the problem. Further, in devising an unemployment compensation program for the District of Columbia in 1935, and for railway employees in 1938, Congress did address the striker question, resolving the question differently in the two instances both from each other, and from the draft state bills. Thus, rather than illustrating, as petitioners would have it, Congress' view upon the resolution of the issue appropriate to national labor policy, these actions illustrate that Congress was quite aware that the labor dispute problem was one inherent in the formation of an unemployment compensation system but nonetheless included the issue within the general broad scope given the states in devising programs. We note, finally, that Congress was, in particular, aware of the New York statute, which had already been passed in substantially its current form when the Social Security Act was under debate, and we demonstrate that the experience rating aspect which was added to the New York statute in 1951 can not possibly detract from the implicit sanction given the New York variant on the labor dispute question.

Third, we discuss two arguments made by petitioners, and by amici appearing on their behalf, which purport to illustrate that an exclusion of strikers was inherent in the statutory scheme of the Social Security Act. The first, that the Act intended to compensate only involuntary unemployment, fails for two reasons: The New York labor dispute provision is

exactly parallel to the draft state bills' sections on voluntary unemployment disqualifications. And, the voluntary/involuntary distinction is necessarily incapable of resolving the labor dispute issue. The second argument, that strikers are "employees" and therefore not unemployed, fails because Congress in 1947 specifically rejected this construct, and also because there is no necessary uniformity between the meaning of "employee" in the National Labor Relations Act and the concept of unemployment established for the entirely different purpose of providing income to those without remunerative work.

III. Until Part III, we entertain the assumption that in fact the policy of the NLRA might, but for Congressional intent to the contrary, demand government neutrality in labor disputes through the denial of benefits to strikers. In this Section, we show that Congress has not in fact entertained that assumption. The few times Congress has established a uniform national policy on the payment of social benefits to strikers, it has determined to pay those benefits, and has made that decision on the ground that *failure* to do so would constitute a lack of neutrality.

Further, there are cogent arguments, many adopted in academic commentary in the early years of the Social Security Act, favoring the view that labor dispute disqualifications in fact interject the government on the employer's side of labor disputes. We survey these arguments, not for the purpose of proving their validity, but rather to show that there is no self-evident answer to the neutrality question. In



this regard, we illustrate that even if one could come to a conclusion regarding the "proper" general approach, one would still have to make a myriad of decisions on various subsidiary questions. This task could involve judicial rewriting of the labor dispute disqualification provisos of virtually every state. Because a general "neutrality" principle is not sufficient for this task, this Court should not attempt to create a uniform approach to the problem when Congress declined to do so.

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## ARGUMENT

### I

### WHETHER OR NOT STATES ARE FORBIDDEN, BY THE NATIONAL LABOR RELATIONS ACT, TO PROVIDE UNEMPLOYMENT BENEFITS TO SOME WORKERS UNEMPLOYED DUE TO A LABOR DISPUTE MUST BE DETERMINED BY DISCERNING THE INTENT OF CONGRESS FROM ALL AVAILABLE MATERIALS.

Petitioners, and amici appearing on their behalf, begin by positing an erroneous framework for assessing the pre-emption question here at issue. They contend that pre-emption of any state enactment which conceivably could influence the resolution of a labor dispute must be presumed, and that this presumption is rebutted only where there is an express, unambiguous statement of Congressional intent to permit that particular kind of legislation by the states.[1] Moreover,

---

[1] *See* Pet. Br., at 33-34, 43, 44; Br. for Chamber of Commerce, at 11, 15, 18; Br. for Dow Chemical Co., et al., at 21, 24; Br. for Rochester Telephone Corp., et al., at 15, 16, 17, 27.

We agree with the Court of Appeals in this case that the legislative intent to permit wide variation in state unemployment

they maintain that in discerning that intent, the focus must be solely on the National Labor Relations Act, rather than upon other indications that the states are free to act with respect to certain matters.[2]

Both of these contentions were definitively laid to rest this past term in *Malone v. White Motor Corp.*, ..... U.S. ....., 46 U.S.L.W. 4295. In *Malone*, the Court began from *Teamsters v. Oliver,* 358 U.S. 283, which held that in general state legislation may not, because of the free collective bargaining mandated by the NLRA, prescribe terms of a collective bargaining agreement relating to mandatory subjects of bargaining. (*Malone,* 46 U.S.L.W., at 4299). The Court noted, however, that this rule itself was "*implied* from the relevant provisions of the labor statutes" (*id.,* at 4297) and that, where there are indications in another federal statute that the implication is not merited as to a specific kind of state legislation, the Court "must spell out from *conflicting indications* of congressional will the area in which state action is permissible." (*Garner v. Teamsters Union*, 346 U.S. 485, 488 (1953) (emphasis supplied) quoted in *Malone*, 46 U.S.L.W., at 4297.)

The Court, in *Malone*, proceeded to survey the language and legislative history of a federal statute entirely separate from the NLRA—the Welfare and

insurance laws as they pertain to labor disputes is, while not explicit, plain enough to remove any ambiguity. (566 F.2d 388, 391). Nontheless, it is important that the issue be put in proper perspective at the outset, so that the attempts to debunk the indices of intent relied upon by respondents may properly be evaluated.

[2]*See* Pet. Br., at 40; Br. for Chamber of Commerce, at 12.



Pension Plans Disclosure Act of 1958, 72 Stat. 997—and to conclude that the Disclosure Act was "a far more reliable indicium of congressional intent with respect to state authority to regulate pension plans" (*Malone,* supra, 46 U.S.L.W., at 4297) than the broad, general principles of the NLRA.

Thus, the *Malone* Court relied on the principle that, in pre-emption cases, "[t]he purpose of Congress is the ultimate touchstone" (*Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, quoted in *Malone*, 46 U.S.L.W., at 4297).[3] And, in discerning that purpose, it sur-

[3]It is particularly instructive that the admonition that "the purpose of Congress is the ultimate touchstone" was stated in the *Schermerhorn* case. For there, the Court was concerned with §14(b) of the NLRA, which authorizes the States to forbid the execution and enforcement of union security agreements which would otherwise be lawful as a matter of federal law under a proviso to §8(a)(3) of the NLRA. The State right-to-work laws which were thus left free to operate have a marked impact on the relative collective bargaining strength of unions and employers—that is why management and labor have over the years devoted substantial resources to the question of whether §14(b) should have been enacted and whether it should be retained.

*Schermerhorn* illustrates that to be given effect, the Congressional determination not to pre-empt state activity despite an impact upon the industrial balance of power need not be stated affirmatively and explicitly either in the statute or in legislative history. In *Schermerhorn*, the precise question was whether Congress, in permitting states to outlaw union security clauses, had also intended to permit states to enforce such prohibition in state courts. On this question there was not a word in the statute, nor was there an explicit declaration of Congressional intent in the legislative history. Nonetheless, the Court concluded that "since it is plain that Congress left the States free to legislate in that field, we can only assume that it intended to leave unaffected the power to enforce those laws." (*Id.*, at 102) Thus, once it had determined that in a particular area "Congress • • • chose to abandon any search for uniformity" (*id.*, at 104), the Court did not require an unambiguous intent to permit a *particular* form of state activity in the area; instead, it reasoned from the general, clear permission to determine Congress' likely intent with regard to a particular variant of the

veyed "the total corpus of pertinent [federal] law and the policies that inspired ostensibly inconsistent provisions" (*Boys Markets v. Clerks Union*, 398 U.S. 235), rather than erecting a presumption of pre-emption and seeking explicit, unambiguous statutory language rebutting that presumption.

Petitioners, and amici appearing in their support, seek to distinguish *Malone* as a case where the congressional purpose to permit state regulation expressly and definitively indicated a purpose to create an exception to the NLRA bar to state regulation.[4]

The Disclosure Act, however, merely declared generally that that Act shall not be interpreted as displacing state regulation in the area of pension plans; no mention is made in the statute itself of intent to permit state substantive regulation of collectively bargained plans. But the Court in *Malone* did not, on that basis, as would be required under petitioner's theory, declare that the NLRA precluded such regulation. Rather, it turned to the legislative history, and to the statute's underlying purpose, and concluded that since "the 1958 Disclosure Act clearly anticipated a broad regulatory role for the states . . . we cannot hold that the [state] Pension Act is nevertheless implicitly pre-empted by the . . . NLRA." 46 U.S.L.W., at 4299. This conclusion was reached

problem. (*See also* the earlier *Schermerhorn* case, *Retail Clerks v. Schermerhorn*, 373 U.S. 746; *Algoma Plywood Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 307-312.)

[4]*See* Pet. Br., at 34-35 n.29; Br. for Chamber of Commerce, at 12 n.3; Br. for Rochester Telephone Corp., et al., at 16; Br. for Dow Chemical Co., et al., at 32-33.



despite the fact that, as of 1958, "the states had thus far attempted little regulation of pension plans" (*Malone*, 46 U.S.L.W., at 4299), with the result that Congress could not possibly have assessed from experience the impact of such regulation upon the collective bargaining process.[5] And, this conclusion was reached by the majority although three justices, agreeing in this regard with the Eighth Circuit, saw the general permission to the states to regulate pension plans in the Disclosure Act as "ambiguous". (46 U.S.L.W., at 4300 (Powell, J., dissenting); see *id.* (Stewart, J., dissenting).)[6]

Thus, the Court in *Malone* did not seek, nor did it find, an explicit, unambiguous indication that Congress in 1958 considered the impact of state pension regulation upon the national labor policy. Rather, since two federal enactments, the NLRA and the Disclosure Act, arguably bore on the issue at hand, the Court approached the problem as one of harmonizing two federal statutory schemes where the Congressional intent as to the proper accommodation was not absolutely lucid.

[5]*Compare* the argument made in this case that the 1935 Congress cannot be taken to have sanctioned labor dispute statutes of the New York variety since none were yet operative. *See, e.g.*, Pet. Br., at 46.

[6]The AFL-CIO, one of the present amici, filed a brief amicus curiae in *Malone*, supporting the result ultimately reached by the Court. In assessing the evidence regarding Congressional intent as to state substantive regulatioin of pension plans, the AFL-CIO specifically noted that that evidence was "less clear than in . . . other federal statutes [but] on balance we believe . . . Congress intended to permit Minnesota to regulate pensions as it did." (Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in *Malone*, *supra*, No. 76-1184, at 26; *see also id.*, at 6, 27.)

Similarly, in this case, the question whether Congress in enacting both the NLRA and the Social Security Act intended in a particular area to permit diversity rather than uniformity of regulation, despite some possible impact on the balance of economic power in the collective bargaining area, must be approached as an ordinary problem of statutory construction, including the resolution of any ambiguities which may appear. This task involves, in the words of Judge Learned Hand, "an imaginative projection upon the occasion that has arisen of what would have been the choice of the lawmakers," and the "'best effort to reconstitute the gamut of values current at the time when the words were uttered." (Lesnick, *The Gravamen of the Secondary Boycott,* 62 Col. L.Rev. 1363, 1393-4, n. 155, quoting a letter from Judge Hand.) It does not involve, as petitioners would have it, an independent interest balancing venture guided only by overall general NLRA principles concerning free collective bargaining.

B. Petitioners' heavy reliance on *Nash v. Florida Industrial Comm'n,* 389 U.S. 235, where the Court held that the states may not withhold unemployment benefits from an individual because she filed an unfair labor practice charge, as supporting their approach to the pre-emption question in this case is entirely misplaced.

The right to resort to a remedial tribunal without state discouragement protected in *Nash* is one which has roots deeper than the national labor policy or, indeed, than any particular substantive federal policy.



We would expect, for example, that the same result would have been reached in *Nash* if the state had cut off benefits upon the filing of any federal court action, or upon the filing of a complaint with any federal agency. Similarly, the *Malone* result, permitting state regulation of pension plans despite interference with free collective bargain, would not sanction, we would expect, a state law requiring that a pension be denied any person who filed a complaint with the NLRB, or the EEOC, or the FCC, or a federal court. Thus, it appears that the federal policy protected in *Nash* is the overriding principle of free access to remedial tribunals, requiring no delphic piercing of the inherent presumptions of this or that federal statute to perceive, and concerning which there is indeed a presumption that the states, the federal government and private persons may not interfere.

For example, *Eastern Presidents RR Conf. v. Noerr Motor Freight Co.,* 365 U.S. 127, and its progeny construed the unqualified language of the Sherman Act as not reaching conspiracies to monopolize the institution of proceedings in the courts and administrative agencies. *NLRB v. Marine & Shipbuilding Workers,* 391 U.S. 416, read into the NLRA the rule that union interference with the filing of NLRB charges is an unfair labor practice, even though §8(a)(4), which specifically so provides with respect to employers, has no parallel in §8(b) of the Act, and even though there were some indications that the Landrum-Griffin Act affirmatively permitted the particular type of interference complained about. And, *Mitchell v. Robert*

*De Mario Jewelry, Inc.*, 361 U.S. 296, found implied the availability of back pay to a person discharged for filing a complaint under the Fair Labor Standards Act, despite a statutory proviso arguably limiting the availability of this remedy.

For this reason, it is not surprising that the Court in *Nash* made no mention of the broad range of options preserved to the states in the Social Security Act. It would be indeed unusual if Congress, in passing one federal statute, had indicated in any manner that states may, under that statute, discourage resort to remedies provided under another federal statute. And, in fact, no part of the Social Security Act, of the legislative history surrounding it, of Congressional treatment of similar questions in other statutes, or of post-1935 attempts to modify either the Social Security Act or the NLRA, suggests any sanction of state compensation statutes conditioning benefits on nonpursuit of any federal remedies. Nor do these materials indicate any perception that the problem was one necessarily inherent in an unemployment compensation system. It follows that petitioner's argument based on *Nash* would have force, if at all, only if the Court of Appeals, and respondents, were relying solely on the general principle that the Social Security Act left states largely free to establish conditions on the receipt of unemployment benefits, rather than on this principle coupled with a panoply of indications that Congress affirmatively recognized and considered, at various times, the necessary and inherent interrelationship between re-



ceipt of unemployment benefits and the economics of labor disputes and determined to leave the matter of this relationship to the states. See Part II, *infra*.

Thus, *Nash* is not inconsistent with the approach of *Malone*, or of *Schermerhorn*. Rather, it involved a situation in which for reasons entirely independent of the presuppositions of the national labor policy, there *is* a presumption against state action, and in which there were no "conflicting indications of congressional will" (*Garner, supra*) tending to rebut that presumption.

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## II

**CONGRESS SPECIFICALLY CONSIDERED, BOTH IN 1935 AND LATER, THE RELATIONSHIP BETWEEN UNEMPLOYMENT BENEFITS AND COLLECTIVE BARGAINING AND DETERMINED TO PERMIT VARIATION AMONG STATES IN THIS REGARD.**

The relevant inquiry, then, is whether the sum of the legislative materials evinces an affirmative Congressional decision to permit states to pay unemployment insurance to strikers. The evidence in this regard is much stronger than that available on the parallel issue in *Malone*. The arguments to the contrary proceed from a misunderstanding of the structure of and relationship between the Social Security Act and the NLRA.

A. The original National Labor Relations Act (Wagner Act) and the basic legislation creating a national unemployment insurance program (Titles III

and IX of the Social Security Act of 1935) moved through the Congress at the same time. The Wagner Act was enacted into law on July 5, 1935, and the Social Security Act became law on August 14, 1935.[7] Senator Wagner was a sponsor of both pieces of legislation, and was the member of Congress most responsible for the format of the unemployment insurance aspects of the Social Security Act.[8] There is nothing in the Wagner Act which deals with striker eligibility for unemployment compensation benefits. But the intent of the 1935 Congress is clearly revealed in the Social Security Act: Eligibility of strikers was to be

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[7]

| *Wagner Act* | *Social Security Act* |
|---|---|
| Senate Debate May 14-16, 1935 | House Debate Apr. 11-19, 1935 |
| House Debate June 19, 1935 | Senate Debate June 14, 15, 17-19, 1935 |
| House Acceptance of Conference Report June 27, 1935 | House Acceptance of Conference Report Aug. 8, 1935 |
| Senate Acceptance of Conference Report June 27, 1935 | Senate Acceptance of Conference Report Aug. 9, 1935 |
| Presidential Signature July 5, 1935 | Presidential Signature Aug. 14, 1935 |

[8]Senator Wagner was the author, in 1934, of the Wagner-Lewis bill, H.R. 7659, 73rd Cong., 2d Sess. (1934), an unemployment compensation bill upon which extended hearings were held in the House of Representatives, but which was not reported out of committee in either House. The provisions of the Social Security Act regarding unemployment compensation were modeled on the Wagner-Lewis bill, after much discussion within the Committee on Economic Security designated to draft the Act whether to abandon the co-operative federal-state Wagner-Lewis model in favor of a national program, or one with tighter federal standards. Witte, *Development of Unemployment Compensation*, 55 Yale L.J. 21, 28-32 (1945); Witte, *The Development of the Social Security Act* (1962), at 3, 111-125. Senator Wagner was also the only member of Congress consulted in the initial drafting of the Social Security Act (Witte, *The Development of the Social Security Act*, at 77), and he was the first witness in the Senate hearings on the bill. (*Id.*, at 81)



left to the states in furtherance of the broad policy of state freedom of action which was preserved in this "scheme of cooperative federalism" (*King v. Smith*, 392 U.S. 309, 316), subject only to certain minimum standards prescribed by §903 of the federal law.

Under the scheme of Titles III and IX of the Social Security Act of 1935,[9] states obtained federal funds for the payment of unemployment compensation benefits if they adopted unemployment compensation laws which were approved by the Social Security Board. Section 903 of the Act required the Social Security Board to approve any state law which satisfied certain conditions; the only conditions dealing with eligibility for benefits was set forth in §903 (a)(5):

> "(5) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization . . ."[10]

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[9]49 Stat. 620; these titles are presently codified at 26 U.S.C. §3301, *et seq.*, 42 U.S.C. §501, *et seq.*, and 42 U.S.C. §1101, *et seq.*

[10]Section 903 is presently codified as 26 U.S.C. §3304(a)(5). That section now provides that the Secretary of Labor, rather than the Social Security Board, shall be the official who exercises the certification function.

In all other respects the states were to be free to create their own eligibility standards.[11]

The broad leeway thus given the States was a matter of conscious choice by Congress. The intent was that:

> "Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington." (S. Rep. No. 628, 74th Cong., 1st Sess., p. 4).[12]

[11]The Dow Chemical brief (at 23 n.7) suggests that Congress meant to allow variations among states with respect to financing arrangements, but not with respect to benefit criteria. This contention is belied by statements in the Senate Committee Report on the Social Security Act (S.Rep. No. 628, 74th Cong., 1st Sess.), the Report of the Committee on Economic Security which drafted the Act (H. Doc. No. 81, 74th Cong., 1st Sess., pp. 13, 16), the account of the Chairman of that Committee (Witte, *The Development of the Social Security Act, supra,* at, e.g., 58, 62, 115, 116, 122, 123, 125), the opinion in *Steward Machine Co. v. Davis,* 301 U.S. 593, approving the Act, and the recent opinion in *Ohio Bureau of Employment Security v. Hodory,* 431 U.S. 471. And, it is belied as well by current administrative interpretation and by the actual development of state unemployment statutes, which vary enormously in their eligibility requirements generally, and their labor dispute provisions particularly, as well as in many other ways. "The Federal law contains no requirements concerning eligibility and disqualification provisions except the labor standard provisions . . . . Each State establishes its requirements which an unemployed worker must meet to receive unemployment insurance." U.S. Department of Labor, *Comparison of State Unemployment Insurance Laws* (rev. Jan. 1975), at 4-1; see also *id.*, generally and particularly, at iii; 4-1 *et seq.*; 4-10; 4-41; 4-42; 4-43, for examples of the degree of variations among state laws on eligibility generally, and labor dispute disqualification particularly. (The discussion in the *Comparison* on labor dispute disqualification appears as an Appendix to this Brief.)

[12]This reservation of broad powers to the States was adopted over the opposition of some who believed that the program should be wholly administered and controlled by the federal government. The Committee on Economic Security whose elaborate report formed the framework for President Franklin D. Roosevelt's recommendation for social security legislation and was transmitted as the substantive appendix to the President's message to Congress on Economic Security, wrestled with the issue of federal standards and control for many months. The Committee ultimately concluded:

> "A federally administered system of unemployment compensation is undoubtedly superior in some respects. . . . All things considered, however, we deem it the safest and soundest policy to confine the role of the Federal Government, with respect to this problem at this time. . . . The plan for unemployment compensation that we suggest contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish." (H.Doc. No. 81, 74th Cong., 1st Sess., pp. 13, 16.)

See Witte, *The Development of the Social Security Act, supra,* for an account of the internal disputes concerning federal versus state standards, and for the view (at 116) that doubts about whether it was possible, without experience, to prescribe adequate federal standards was a chief reason for declining to do so.



This structure of the Social Security Act—that is, the understanding that states were free to prescribe eligibility standards *except* for the provisions of 903 (a)(5)—undermines entirely the argument that the failure of Congress expressly to grant permission to states to pay benefits to strikers is crucial. For, the structure Congress determined to adopt for the unemployment insurance scheme precluded the necessity for spelling out which variants upon that scheme were to be approved; given that structure, the only necessity was to spell out prohibitions. Since Congress did not affirmatively prohibit the payment of unemployment insurance to strikers, and since such payment is consistent with the standards Congress did impose, Congress could, without more, be taken to have determined such payments to be consistent with federal law.

B. There is, however, more.

1. First, and most important, the problem of the interrelation of unemployment compensation and the system of free collective bargaining was directly considered by the framers of the 1935 Social Security Act. Section 903(a)(5), the only section of the Act setting substantive standards, dealt directly with this relationship, and set, as the only federal standards in this area, the requirements that unemployment benefit standards may not (a) require workers to be strikebreakers; (b) affect union bargaining position by artificially depressing wages in an area; or (c) undermine unions by fostering yellow-dog contracts and company unions. This section of the 1935 Act was taken verbatim from the 1934 Wagner-Lewis bill, so that it was actually Senator Wagner, the author of the NLRA, who devised it. (See, Witte, *Development of the Social Security Act, supra,* at 136).[13]

Section 905(a)(5)(A), forbidding the states to disqualify workers from eligibility for unemployment compensation benefits for refusing to accept new work "[i]f the position offered is vacant due directly to a

[13]There were at least two attempts to alter what became §903(a)(5) in the course of devising the 1935 Act. First, employers objected to the company union provision before the Committee on Economic Security, but President Green of the AFL-CIO succeeded in persuading the Committee to retain the provision as it was in the Wagner-Lewis bill. (Witte, *Development of the Social Security Act, supra,* at 136.) Second, there was a controversy over the prevailing wage provision while the bill was before Congress, which was settled only when Senator Wagner intervened and assured retention of his earlier language. Until the prevailing wage issue was settled, support of organized labor for the entire Social Security Act was in doubt. (*Id.,* at 88.)



strike, lockout, or other labor dispute," is of particular significance. Plainly, this provision reduces employee incentive to engage in strikebreaking, and accordingly limits the struck employers access to the pool of the unemployed, the most likely source of labor. In this respect, payment of benefits to persons who, without such benefits, might be compelled to take work in a struck plant to provide for subsistence affects the economic balance of power in much the same way as payment to strikers themselves. Nonetheless, Congress made the deliberate choice that states could not penalize workers who refused to act as strikebreakers by denying them unemployment benefits.

This choice is significant *first* because it illustrates an awareness of the fact that payment or non-payment of benefits can affect labor disputes; *second,* because despite this realization, the more obvious but parallel problem of the existing work force of a struck plant was not addressed with any federal standard; and *third,* because the actual choice made—to *require* payment despite an effect on the labor market and hence on the economics of labor disputes—illustrates that Congress in 1935 did not view such a choice as fundamentally inconsistent with the nascent national labor policy.

2. The issue whether and under what conditions to grant or deny benefits to those who are themselves on strike or out of work due to a labor dispute at their place of employment was plainly recognized in 1935 as a problem the state unemployment compen-

sation statutes would have to address. In the draft bill prepared for the use of state legislatures contemplating entry into the unemployment compensation program, the Committee on Economic Security made the "suggestion" that the states disqualify from eligibility persons whose unemployment is due to a labor dispute. (The first of these draft bills was before Congress.) (See Witte, *The Development of the Social Security Act, supra,* at 125; Social Security Board, *Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Types* (1936) (cover page); Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., at 601, 621.) The inclusion of this "suggestion" demonstrates that the framers were well aware that there was a policy issue to be faced here; the fact that it was merely a "suggestion" and not included, as was the prohibition on requiring unemployed persons to act as strikebreakers to be eligible for benefits, in the basic commands of the statute, demonstrates that the statutes like that in New York were to be allowed to continue in effect.

Also noteworthy is that the two sets of draft bills—those devised by the Committee on Economic Security before the Act passed, and those devised soon after the Act's passage by the Social Security Board charged with administration of the Act—*differed* in their labor dispute provisions. The former disqualified any employee if his unemployment was "due to a labor dispute still in active progress at the establishment in which he is or was last employed," (Hearings,



*supra,* at 601, 621); the latter disqualified employees only if there was a "stoppage of work," and then only if:

> "He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and
>
> 2. He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute;
>
> and provided further that if in any case separate branches of work, which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall for the purposes of this subsection be deemed to be a separate factory, establishment or other premises." (*Draft Bills, supra,* at §5(d).)

Adoption and application of these different provisions in various states could result in quite a different balance of economic power in labor disputes. For, the Committee on Economic Security bill might disqualify individuals unemployed "due" to a labor dispute, but having no interest in it, and might disqualify strikers even though they were permanently replaced and had no jobs to return to. The Social Security Board's draft attempted to circumscribe those disqualified to eliminate these possibilities. This difference could affect the powers of economic resist-

ance of employers (see *Hodory, supra,* 431 U.S., at 492), and yet both were declared consistent with federal law by official bodies intimately connected with the Act in its infancy.

Thus, the presence of the labor dispute disqualification language in the draft bills has quite the opposite significance to that ascribed by petitioners and amici. That language confirms the indications in §903(a)(5) that Congress in 1935 was quite aware that states would be constrained to face the labor dispute question, and affirmatively determined to leave the resolution of that question to the states.

3. Similarly, the fact that Congress has always excluded strikers from the District of Columbia's unemployment compensation scheme is no gauge at all of Congress' national intent, and instead, confirms the purpose of permitting variation among states on the problem.

Whenever Congress enacted a law which explicitly permitted a degree of choice in state programs, it was required, prior to the advent of D.C. home rule, to switch hats and, acting in essence as a state legislature for the District, make policy choices from the options available just as the states are obliged to do. Thus, in the present situation, if the passage in 1935 of a statute excluding compensation to strikers in the District tells us anything, it reinforces the conclusion that Congress in 1935 was quite aware that a state legislature acting under the Social Security Act would have to face the question whether to provide benefits



to strikers, and it nonetheless left that question within the permissive area.[14]

Further, the labor dispute provision of the first District of Columbia unemployment compensation statute differed from that in *both* draft bills; it disqualified employees only if their unemployment was "directly due to a *strike* or *jurisdictional labor dispute.*" (49 Stat. 950, emphasis supplied).

Once again, the difference between this language and that "suggested" by the Committee on Economic Security and the Social Security Board could well have some impact on behavior of the parties to a labor dispute—for example, an employer might be unwilling to engage in a lockout under the 1935 D.C. bill, and therefore lose whatever tactical advantage might be gained thereby, while, since the Committee on Economic Security language would apply to lockouts as well as strikes, a covered employer under the draft bill would not face that constraint. Thus, Congress, in drafting the D.C. bill, took advantage of precisely that permission to draw whatever lines it desired in regard

[14] An analogy to the situation under §14(b) of the NLRA is helpful: Congress in 1947 enacted a statute permitting states to pursue their own union security policy. It then permitted union security clauses to continue in effect in the District. (See *Giant Food Shopping Center, Inc.,* 77 NLRB 791 (1948).) Thereby, it chose for the District from the options available to the states, but did not derogate from the express statutory permission to the states to disagree with its choice.

to labor dispute disqualifications which it had granted to the states.[15]

4. In 1938, only three years after the passage of the Social Security Act, Congress again had occasion, in enacting the nationally-uniform Railway Unemployment Insurance Act (RUIA), to set directly for a certain group of covered employees the benefit eligibility standards which it had left to the states in 1935.

This time a different balance with regard to labor dispute disqualifications was struck than that included in any of the draft bills *or* in the D.C. law: strikers could be disqualified only if the strike violated the Railway Labor Act or his union's rules; there would be no disqualification in case of a lockout; and, if there was an illegal or unauthorized strike, then those employees disqualified would be limited to those with an interest in the outcome of the strike. 45 U.S.C. §354 (a-2), (b).

The limitation language is substantially that of the Social Security Board Draft Bill. Thus, the 1938 Congress was clearly aware of the "suggested" work stoppage language contained in that draft, and determined to reject it in favor of a different approach.

The explanation of petitioners and amici of the RUIA striker provisions—that they represent a specialized accommodation to the Railway Labor Act,

[15]In 1943, Congress added lockouts to the D.C. labor dispute disqualification, but added as well the limiting language from the Social Security Draft Bill to circumscribe those individuals affected to those with an interest in the outcome of the dispute. (57 Stat. 100).



which it is said, differs from the NLRA in its emphasis upon use of economic weapons—disregards the fact that airline employees have been covered since 1936 by the Railway Labor Act (45 U.S.C. §181) but were not included in the RUIA (see 45 U.S.C. §351 (a)). Congress consequently could not have regarded the RUIA striker provisions as integral to the scheme of the RLA. For, by leaving airline employees out of the RUIA, it necessarily subjected them to the disuniform labor dispute disqualifications of the various state laws and, in many instances, to disqualification even where the strike was a legal one.

The RUIA, therefore, illustrates once again that Congress was quite aware of the labor dispute disqualification issue inherent in devising unemployment compensation laws, and that, in those instances in which Congress itself set benefit standards, it adopted various provisions on benefits during labor disputes rather than adhering to a rigid view of the matter. It would be odd, indeed, had Congress intended to impose upon the states a uniformity which it did not itself exercise.

5. Finally, there is the fact that the New York statute had already been enacted when the Social Security Act was passed, with substantially the same labor dispute disqualification as now exists, and that Congress was aware of the New York Act. (S. Rep., *supra,* at p. 13). Moreover, since an editorial appeared in the New York Times on April 21, 1935 (at p. 16) decrying the labor dispute disqualification provision as government subsidy for strikers, it is likely that

members of Congress then engaged in considering the Social Security Act were aware of that provision, and of the arguments against it. Yet it is said, among other things, that the New York statute at the time had no experience rating system, so that the alteration of economic power worked then and now differed.

If this argument is meant to imply that a strikers' provision may be valid if the benefits paid out are not reflected in the employer's tax rate,[16] it merely exposes the central problem with petitioners' entire theory: that it would require courts to determine, from the vast number of permutations of labor dispute provisions in use or enacted in the future, which variants strike precisely the balance the national labor policy demands. (See Part III (B) *infra.*) For, Congress in 1935 certainly did not suggest this limitation upon payment of benefit to strikers; indeed, it expressly gave states permission to adopt experience rating systems, without qualifying that permission with strictures concerning payments during labor disputes.

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[16]Provisions in state laws exempting from the experience rating computation the costs of benefits of certain types are not uncommon. See *Comparison, supra,* at 2-10; see also, J. Becker, *Experience Rating in Unemployment Insurance: Virtue or Vice* (Upjohn Institute, 1972), at 27. Thus, while we are not aware of any such provision, a state could well choose to pay benefits to some strikers but not to include such benefits in experience rating computations.

Further, experience rating systems differ widely among themselves as to the method used for determining the variable tax rate, and as to the degree of sensitivity of the tax rate to differences among employers in benefit charges. See *Comparison, supra,* at 2-8 to 2-13; J. Becker, *supra,* Chapter II.



Moreover, the entire notion that the unemployment system, especially where there is an experience rating system, is a "transfer" of funds from employers to employees, and therefore particularly objectionable, is inconsistent with this Court's declarations on the matter. In *Carmichael v. Southern Coal Co.*, 301 U.S. 495, the court declared that contributions required of employers under state unemployment compensation statutes are "[t]axes" since they "are but the means of distributing the burden of the cost of government." (*Id.* at 508). Thus,

> "[p]ayments of unemployment compensation [are] not made to employees by [employers] but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation to respondent, but to carry out a policy of social betterment for the benefit of the entire state." (*Labor Board v. Gullett Gin Co.*, 340 U.S. 361, 364.)

And, *Gullett Gin* specifically rejected the contention that an experience rating system somehow alters this conclusion. (*Id.* at 365.)[17] Since the experience rating

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[17]It is also worth noting that, while the experience rating system does gauge taxes to benefits paid, there is not, as petitioners suggest, a one-to-one ratio. For, New York, like other states "[has] stopped far short of complete experience rating . . . There is a substantial amount of sharing benefit costs." (J. Becker, *supra,* at 4; see *id.*, at 30, for the calculation that in 1967, over 37.6% of all benefits in New York were not charged to individual employer accounts, with the chief reason being that there is a maximum tax rate regardless of experience.)

system is merely one of several ways to peg the taxation rate, and since Congress specifically contemplated in 1935 that many states would adopt this method, the fact that New York had no such system in 1935 cannot be taken as evidence that Congress meant to permit benefits to strikers only if the employer's tax rate were not affected.

Thus, it is clear that the Congress that passed both the Wagner and Social Security Acts had addressed the question of whether payment of unemployment benefits should be made to strikers and had determined that permitting the States to do so was wholly consistent with its intentions.

5. Titles III and IX of the Social Security Act of 1935 have been amended many times. But the provisions with which we are here concerned have remained unchanged, and the understanding that they permit but do not require states to pay benefits to workers involved in a labor dispute still holds sway. As Congressman Mills, the Chairman of the House Ways and Means Committee and the floor manager of the Employment Security Amendments of 1969 stated in discussing an administrative proposal to forbid unemployment insurance payments to strikers:

> "We have tried to keep from prohibiting the States from doing the things the States believe are in the best interest of their people. There are a lot of decisions in this whole program which are left to the States. For example, there are two States, I recall, which will pay unemployment benefits when employees are on strike . . . That is their privilege to do so. They are taxing their employers within the State to pay unemployment benefits. If the legislature wants to do it, why not let them do it? I would not vote for it, and the gentleman would not vote for it, but if the States want to do it we believe they ought to be given latitude to enable them to write the program they want." (115 Cong. Rec. 34106 (1969).)



"Not lightly vacated is the verdict of quiescent years." (*Coler v. Corn Exchange Bank,* 250 N.Y. 136, 141, 164 N.E. 882, 884.)

In sum, in dealing with the extent to which unemployment compensation benefits would be available in the strike context, as in dealing with the extent to which union security agreements would be lawful, Congress has chosen "to abandon any search for uniformity . . . and decided to suffer a medley of attitudes and philosophies on the subject," (*Shermerhorn, supra,* 375 U.S. at 104-105). Given that choice, a state decision to ultilize the authority reserved to it by federal law to pay such benefits (so long as the conditions set out in § 903 are observed) no more raises a Supremacy Clause question than a state decision to adopt a so-called "right-to-work" law (within the confines noted in *Schermerhorn, id.,* at 105). In each instance, while it is the state that acts, it is Congress that has set the policy permitting that action.

C. Petitioners and amici suggest that, despite all of the evidence that Congress in 1935 was quite aware of the problem of unemployment benefits in labor disputes and determined to leave the issue to the

states, a preclusion upon strikers' benefits is somehow inherent in the structure of Social Security Act.

This argument rests on two contentions, each of which is entirely incorrect: first, that the Social Security Act permits payment only to persons involuntarily unemployed in the sense that they lost their last job for reasons beyond their control, and second, that since a person on strike has not severed entirely his relationship with his former employer, he may not be considered unemployed at all under the Social Security Act.

1. As to the first contention, it is true that all the states have exercised their discretion as regards payment of unemployment benefits by imposing some requirements designed to assure that beneficiaries are not without work entirely because of their own preference. (See U.S. Department of Labor, *Comparison, supra*, at 4-1 et seq.). Yet, while, as appellants state, Congress' main concern *was* with persons involuntarily unemployed, there is no express federal requirement that benefits be so limited, and there is therefore no federal proscription stating the manner in which to accomplish such a limitation, or the sense in which unemployment must be "involuntary."

The 1935 Committee on Economic Security draft bills provide as follows with respect to persons who are "voluntarily" unemployed in some sense:

> "(5) *Voluntary leaving.*—An employee who has left his employment voluntarily without good cause connected with such employment shall be ineligible for benefits for the week in which such



> leaving occurred and for the 3 next following weeks; provided, moreover, that such weeks shall be charged (as if benefits for total unemployment had been paid therefor) against the employee's most recent weeks of employment (by the employer in question) against which benefits have not previously been charged hereunder.
>
> "NOTE.—The above subsection (5) is considered to be equitable. The period of disqualification may, of course, be lengthened, or the person quitting voluntarily without reasonable cause may be entirely disqualified, if the State so desires.
>
> "(6) *Discharge for misconduct.*—An employee who has been discharged for proved misconduct connected with his employment shall thereby become ineligible for benefits for the week in which such discharge occurred and for not less than the 3 nor more than the 6 next following weeks, as determined by the commission in each individual case; provided, moreover, that the ineligible weeks thus determined shall be charged (as if benefits for total unemployment had been paid therefor) against the employee's most recent weeks of employment (by the discharging employer) against which benefits have not previously been charged hereunder, and shall also be counted against his maximum weeks of benefit per year." (Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., "Economic Security Act," Feb. 9, 1935, p. 601).[18]

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[18]The 1936 Social Security Board draft bills (at 9) similarly provided:

> "Section 5. DISQUALIFICATION FOR BENEFITS
> "An individual shall be ineligible for benefits:
> "(a) For the week in which he has left work voluntarily without good cause, if so found by the commission, and for

As noted, the draft bills are uninformative upon what Congress thought the Act *required,* but they do indicate what Congress, and the Social Security Board, thought the Act permitted. Thus, those who fashioned and administered the Act clearly did not contemplate that persons in some sense responsible for losing their last jobs could not receive benefits, although they apparently deemed it desirable to discourage voluntary quits and misconduct by imposing a relatively short period of deprivation of benefits.[19]

not less than one nor more than the five next following weeks, (in addition to the waiting period) as determined by the commission according to the circumstances in each case.

"(b) For the week in which he has been discharged for misconduct, if so found by the commission, and for not less than one nor more than the nine next following weeks, (in addition to the waiting period) as determined by the commission in each case according to the seriousness of the misconduct.

"*Note* 1: The above subsections (a) and (b) are considered equitable. The period of disqualification may, of course be lengthened or shortened, or the person discharged for misconduct or quitting voluntarily without reasonable cause may be entirely disqualified, if the State so desires, but a state should give serious consideration to the injustice of such entire disqualification if employee contributions are required. There is submitted below an alternative provision providing for such entire disqualification in cases of discharge for misconduct."

[19]Many states, and the District of Columbia, do now pay persons who have voluntarily quit or been discharged for misconduct, after a short waiting period. See U.S. Department of Labor, *Comparison, supra,* at 4-27 to 4-34.

This form of disqualification—a relatively short waiting period in addition to that uniformly imposed on all claimants—was the predominant form in the early years of the Social Security Act. As of December 31, 1937, 45 states took this approach to voluntary leaving, and 44 to discharge for misconduct. Kempfer, *Disqualifications for Voluntary Leaving and Misconduct,* 55 Yale L.J. 147, 147-148 (1945). The District of Columbia statute passed by Congress in 1935 had disqualifications as short as one week (see 49 Stat. 950).



After the waiting period, as long as the claimant was able and available for work and sought out job opportunities, it was felt that the unemployment was indeed "involuntary."

New York, by imposing a relatively lengthy waiting period upon benefits for strikers, has thereby adopted precisely the approach to this disqualification suggested in 1935 with regard to "voluntary" unemployment.[20] Thus, even if each person affected by the labor dispute disqualification were considered to have "voluntarily" left his last job, the New York approach could not be deemed inconsistent with the Act.

Moreover, the drafts bills (and most current state laws, see *Comparison, supra,* at 4-5 to 4-6) limited disqualification to those who voluntarily quit without good cause. The New York labor dispute temporary disqualification, and those of most other states which do pay strikers under some circumstances, have no such limitation. Thus, even if the strike is caused by a wage cut, an unfair labor practice, a breach of a collective bargaining agreement, a failure to pay the prevailing wage, or some other circumstance which might well constitute "good cause" if an individual resigned for that reason, a striker disqualification could apply if a group of employees struck for that same reason. On the other hand, the alternative—

[20]While Rhode Island is the only other state currently taking this approach to labor disputes, as of 1940 there were five states in addition to New York with similar provisions, at least two of which had considerably shorter disqualification periods than that in New York. See Fierst & Spector, *Unemployment Compensation in Labor Disputes,* 49 Yale L.J. 461, 462 (1940).

looking into the merits of a labor dispute to decide if those on strike were striking for "good cause"—might indeed embroil state agencies directly in that sphere of labor relations reserved to the disputants.

Similarly, many of the labor dispute disqualification provisions, including that in New York, make no attempt to separate those voluntarily taking part in the strike from those affected thereby but not participating.[21] And, lockouts are excepted from some state labor dispute provisions, but not others. (See Appendix; see also *Hodory, supra.*) In this sense, too, the labor dispute provisions sweep broader than an individualized determination of involuntary unemployment. And, once again, the alternative—investigating the personal motivation of each person out of work on account of the dispute—could have a more intrusive effect upon labor relations than class judgments.

Thus, the involuntary unemployment concept, rather than having the import suggested by petitioners, points in quite the opposite direction: it demonstrates that ordinary concepts of voluntariness and involuntariness do *not* necessarily prescribe an obvious answer to the labor dispute problem, and that, for that very reason, it was recognized in 1935 that the issue would have to be addressed separately and diversely in the various state acts. See also Part III(B), ***infra.***

[21]Even the version in the Social Security Board Draft Bill, which makes some attempt to separate the interested employees from others, still disqualifies individuals in the same classification as the strikers even if they actively oppose the strike.



2. The second contention regarding an implicit determination of the striker issue in the Social Security Act is premised primarily upon the observation that strikers are "employees" under the National Labor Relations Act (§§ 2(3) and 9(c)(3).) The assertion is that they therefore cannot simultaneously be unemployed for purposes of receiving benefits designed to replace lost wages. This contention is entirely misconceived.

First, and most important, Congress in 1947 specifically *rejected* this equation between the definition of "employee" in the NLRA and receipt of unemployment benefits.

The wisdom of permitting strikers to draw unemployment compensation was then, as it is now, a controversial issue. For example, there had been industry and press criticism of Pennsylvania's unemployment payment of benefits to striking miners in 1946.[22] The House of Representatives' version of what became the Taft-Hartley Act would have attempted to end the practice by declaring that strikers who accepted unemployment compensation benefits would thereby forfeit their status as employees and lose the statutory right to reinstatement which flows therefrom. (Cf. *Labor Board v. Mackay Radio Corp.,* 304 U.S. 333.) This was to be accomplished by amending the statutory definition of "employee" to exclude any person "receiving unemployment compensation from

[22]Committee on Ways and Means, House of Representatives, 79th Cong., 2nd Sess., Hearings on Social Security Legislation, p. 1384.

any state."[23] The House Committee on Education and Labor report explained the purpose of this provision:

> "A few States pay strikers after the fifth, sixth, or seventh week of a strike. This clearly is a perversion of the purposes of the social security laws, which Congress intended to provide for unemployment compensation for those out of work invountarily and through no fault of their own. We therefore have provided that a striker's status as an 'employee' stops when he starts receiving unemployment compensation from any State. He may receive relief from his union, from local welfare funds or from charity without losing that status."[24]

The Senate, however, did not adopt this proposal. Instead, it determined to "follow the provision of the existing law [regarding the definition of 'employee'] with three exceptions," none of which touched the rights of strikers.[25] The Senate's view prevailed on this issue, although the House version of the definition of "employee" was adopted in other respects.

It is contended that this sequence is equivalent to mere Congressional silence. To the contrary, the decision to reject a provision enacted by one house of Congress which would have had substantially the

[23]H.R. 3020, 80th Cong., as reported out, p. 4, and as it passed the House, p. 4, reprinted in I Legislative History of the Labor-Management Relations Act of 1947 (hereafter "1947 Leg. Hist."), at pp. 34, 161.

[24]House Report No. 245 on H.R. 3020, 80th Cong., pp. 12-13, 1947 Leg. Hist., pp. 303-304.

[25]House Conference Report No. 510, 80th Cong., 2d Sess., p. 33.



effect sought in this lawsuit must be taken to constitute a rejection of the premise of that provision—that there is a fundamental inconsistency between the NLRA and the payment of unemployment insurance to strikers. See *Labor Board v. Drivers Local Union,* 362 U.S. 274, 288-290.

Furthermore, definitions in federal statutes of terms such as "employee" are explicitly limited in their application to the particular statute involved (see, e.g. 29 U.S.C. § 152), and the definition of such terms varies greatly from one statute to another, in accord with the purpose and coverage of that statute. As Justice Holmes wrote, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner,* 245 U.S. 418, 425. Particularly is this true of the word "employee". See *United States v. American Trucking Association,* 310 U.S. 534, 545, n. 29. To begin importing a definition of "employee" from one federal statute to another is to do violence to the congressional intent to limit the definition to the statute in which it appears, and to the underlying purposes of the statute into which it is imported.

Finally, there are many other categories of persons who are "employees" under the National Labor Relations Act but *are* considered unemployed within the meaning of the unemployment compensation program. For example, persons laid-off for economic reasons are considered "employees" for purposes of the NLRA if "they [have] a reasonable expectancy

of further employment in the foreseeable future." (*Scobell Chemical Co. v. NLRB,* 267 F.2d 922 (C.A. 2). Under this test, ordinary laid-off employees are regularly held to be "employees" within the definition of the NLRA. (*Scobell, supra*; *American Export Lines,* 81 NLRB 1499; *Sullivan Surplus Sales, Inc.,* 152 NLRB 132; *D & H Farms,* 192 NLRB 53.) Yet, such persons can clearly be unemployed within the meaning of the unemployment compensation law of every state, if they are not in fact working. Indeed, since "[t]he purpose of the Act was to give prompt if only partial replacement of wages to the unemployed, to enable workers to 'tide themselves over, *until they get back to their old work* or find other employment * * *'" (*California Department of Human Resources v. Java,* 402 U.S. 121, 131, quoting H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935) (emphasis supplied)), they are at the core of those whom the unemployment compensation system was intended to protect.[26]

Thus, it is simply not true that a person who is an employee for labor relations purposes, and thus entitled to protection as regards certain interactions

[26]Similarly, part-time employees are considered "employees" for purposes of the NLRA regardless of the number of hours worked (see 29 U.S.C. § 152 (3)), although the regularity and extent of work is considered to be relevant regarding whether there is sufficient community of interest with full-time employees for unit-determination purposes. See, e.g., *Hurst Corp.,* 221 NLRB No. 67; *Sears, Roebuck & Co.,* 193 NLRB 330; *Sears, Roebuck & Co.,* 172 NLRB No. 132; *Scoa, Inc.,* 140 NLRB 1379. Yet the unemployment statutes of all states treat some persons working part-time as unemployed. See U.S. Department of Labor, *Comparison, supra,* p. 3-9.



with his employer or former employer, cannot be unemployed for purposes of determining whether he is entitled to benefits designed for persons who are not in fact receiving sufficient income. The federal labor relations system is designed only with regard for the responsibilities of employees, unions and employers *vis à vis* each other; its concepts are entirely uninformative in deciding whether a person is within the group which Congress intended to benefit in an entirely separate income support program. In this respect, also, the contention that the proper uniform answer to the striker problem is somehow implicit in the NLRA, or the Social Security Act, or both, must fail.

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## III

### CONGRESS DOES NOT CONSIDER PLAINTIFF'S ABSOLUTIST VIEW OF A FREE LABOR MARKET TO BE ESSENTIAL TO COLLECTIVE BARGAINING.

To this point, we have assumed *arguendo* that the "calculus of [federal] laws regulating labor-management disputes" (*Super Tire Engineering Corp. v. McCorkle,* 416 U.S. 115, 124) does, as plaintiff argues, create a collective bargaining system which is hermetically sealed from all governmental influence, while demonstrating that Congress has determined not to completely occupy this field but rather to authorize the states to pay unemployment compensation to strikers if they wish to do so. We now turn to a demonstration that since passing the Wagner Act, Congress has not only permitted the states to pass and enforce benefit programs that affect the labor

market, but has itself structured such programs in a manner that affects the balance of power between employers and unions.

A. As the earlier discussion illustrates, the federal standards embodied in the unemployment compensation program themselves provide a significant example. For § 903(a)(5) sets the condition that benefits may not be denied because an unemployed person will not take a job for an employer involved in a labor dispute. This command does potentially alter the balance of power during a strike, but was adopted nonetheless.

Moreover, in the two similar federal government benefit programs of which we are aware in which the federal government has maintaining plenary control, Congress has demonstrated that it does not share plaintiff's view of the incompatibility of free collective bargaining and the payment of government benefits to strikers. The Railway Unemployment Insurance Act, adopted three years after the Social Security Act of 1935, has already been discussed. Congress provided for payment to strikers under the RUIA despite the objection of employer representatives that railroad employers would thereby be given more favorable treatment than employees in the great majority of the States, which disqualified strikers unreservedly. The Railway Unemployment Insurance Act has frequently been amended, and on two occasions (1959 and 1963) there were changes in the disqualification provisions.[27] But the provision regarding striker eligibility has been preserved intact.

[27] 73 Stat. 31, 77 Stat. 222.



The remaining piece of relevant legislation is the Food Stamp Act of 1964, as amended.[28] As orginally passed, § 5 of that Act provided:

> "Participation in the food stamp program shall be limited to those households whose income is determined to be a substantial limiting factor in the attainment of a nutritionally adequate diet.
>
> (b) In complying with the limitation on participation set forth in subsection (a) above, each State agency shall establish standards to determine the eligibility of applicant households. Such standards shall include maximum income limitations consistent with the income standards used by the State agency in administration of its federally aided public assistance programs. Such standards also shall place a limitation on the resources to be allowed eligible households. The standards of eligibility to be used by each State for the food stamp program shall be subject to the approval of the Secretary."[29]

Three years later the House Committee on Agriculture "received testimony of * * * the use of stamps to support participants in voluntary work stoppages or labor disputes."[30] The Committee proposed, and the House adopted, an amendment to § 5(b) providing:

> "Notwithstanding any other provision of law, any person who is engaged in a strike, labor dispute, or voluntary work stoppage shall be ineligible to participate in any food stamp program established pursuant to this Act: Provided, That if any such person was eligible for and was receiving food

[28] 78 Stat. 703, 7 U.S.C. § 2011, *et seq.*

[29] 7 U.S.C. § 2014.

[30] H. Rep. No. 1619, 90th Cong., 2d Sess., p. 2.

> stamp assistance pursuant to the provisions of this Act prior to the existence of a strike, labor dispute, or voluntary work stoppage, such person shall not be ineligible for participation in the food stamp program solely as a result of engaging in such strike, labor dispute, or voluntary work stoppage."[31]

The Senate refused to accept that amendment, and in conference the House receded. The statement of the managers on the part of the House declared:

> "3. *Strikers and students eligibility*—The House bill made strikers and students ineligible to participate in the food stamp program under certain conditions. The conference substitute deletes this House provision and leaves the determination of eligibility to be made under the existing law."[32]

Thus, at that point the situation was that which had obtained with regard to unemployment compensation in 1947: The House had proposed that a benefit program that had been administered by the states in a manner that permitted strikers to be eligible be amended to forbid that practice, the Senate rejected that proposal and the result was a determination by Congress to follow the "existing law."

But the evolution of the Food Stamp Act did not end at that point. In 1970, § 5 of the Food Stamp Act was amended again, in this instance to empower the Secretary of Agriculture to establish "uniform na-

[31] *Id.*, at p. 4.

[32] H. Conf. Rep. No. 1908, 90th Cong., 2d Sess., p. 2.



tional standards of eligibility." At this point, it became necessary to prescribe federal standards as to the eligibility of labor dispute participants, rather than leaving the matter to the states along with other eligibility problems.

The result was the determination that "refusal to work at a plant or site subject to a strike or lockout" shall not be a basis for ineligibility. (84 Stat. 2049, amending 7 U.S.C. § 2014). The statement of the managers on the part of the House as to this provision stated:

> "The conference substitute also makes it clear that the refusal to accept work at a plant or site which is subject to a lock-out is the equivalent to the refusal to accept work at a struck plant or site and thus will not, by itself, be the basis for denying food stamp assistance to any person."[33]

In light of plaintiff's contention that the payment of benefits to strikers is incompatible with federal labor relations law, the following passage from the House Report that recommended the provision preserving food stamps for strikers in the 1970 uniform federal standards is particularly pertinent:

> "The committee debated at length the question of striker participation in the Food Stamp Program; it rejected a provision which would have automatically made strikers ineligible for food stamps. In lieu of such a provision the committee adopted language which clearly states that no person (neither a striker nor a nonstriker) need ac-

[33] H. Conf. Rep. 91-1793, 91st Cong., 2d Sess., p. 7.

> cept employment or training at a struck plant or site. The committee does not wish to take sides in labor disputes and does not believe this bill is the proper place to solve labor-management problems. The Secretary, through regulation, is free to establish whatever requirements he deems appropriate as to the method and time for strikers to register for employment or training at facilities not subject to a strike."[34]

The short of the matter is this: The contention that the system of free collective bargaining mandated by the NLRA entails a requirement of governmental neutrality in the sense that strikers may not be paid benefits pursuant to programs based on insurance or need principles is a pure construct. For, the evidence provided by Congress' actions and words in dealing with this precise problem demonstrates that Congress' conception of government neutrality is to permit the states to decide whether strikers shall be eligible under cooperative federal-state benefit programs, and to pay strikers on the same basis as all other workers in the same financial position in those programs as to which the federal government retains plenary control.[35] It is not for the appellees, or the courts, to dis-

[34]H. Rep. No. 91-1402, 91st Cong., 2d Sess., p. 3.
There was, last year, another attempt to disqualify strikers from the food stamp program. Once again, the proposal was rejected as constituting federal pressure against striking workers. H. Rep. No. 95-464, 95th Cong., 1st Sess. (1977).

[35]This, of course, points to the fallacy in the argument that Congress specifically provided benefits for strikers when it wished to and must be taken to have intended the opposite when there is no explicit provision. For, Congress has made a decision about benefits for strikers only in enacting uniform federal benefit programs, as to which it was compelled to address the question. In every



turb this view of the proper role of the government in strike situations.

B. The conclusion reached by Congress in those instances in which it was obliged to choose a uniform federal standard on social benefits for strikers is supported by academic commentary which appeared in the first decades after the passage of the Social Security Act. It is useful to summarize some of the arguments made in favor of *eliminating* (or substantially contracting) the labor dispute disqualifications, for they indicate that the "neutral" position is at least not self-evident.

First, the labor dispute disqualifications entail, in large part, a discrimination against strikers, as compared to other unemployed workers. For,

> "If the 'voluntary' nature of an individual's employment is to be the test, there would seem to be as much reason to consider the economic and psychological pressures which may be present in the case of a concerted leaving of work as in the case of an individual leaving." (Lesser, *Labor Disputes and Unemployment Compensation,* 55 Yale L.J. 167, 171 (1945).)

And,

> "If it is socially desirable to pay benefits to workers who have left unsuitable employment or refuse to accept such employment, there seems to be no good social reason for denying benefits to workers on strike because of conditions which make the work unsuitable." (*Id.*)

instance in which eligibility standards are left to the states, the labor dispute issue was not addressed by Congress but, rather, left to the states.

This discrimination was itself seen as injecting government into the balance of economic power, since "by ignoring the merits of the dispute, the state may often penalize employees for attempting to achieve the aims to which enlightened social legislation has pointed." Fierst & Spector, *Unemployment Compensation in Labor Disputes,* 49 Yale L.J. 461, 464. See also Lesser, *supra,* at 170; Schindler, *Collective Bargaining and Unemployment Insurance Legislation,* 38 Col. L. Rev. 858, 874.

Second, either the presence or absence of benefits will be likely to have an effect upon labor disputes:

> "Accepting the thesis that unemployment compensation systems should be neutral in labor disputes, it by no means follows that benefits should be denied. To the extent that payment of benefits would have the unneutral effect of supporting workers and fostering strikes, the denial of benefits would have the unneutral effect of supporting employers and discouraging strikes and fostering lockouts. Nor does the fact that workers denied benefits are no worse off than if the unemployment compensation law had never been passed alter the effect of the denial of benefits. The very existence of the law with the promise of benefits to those who do not in concert with other workers refrain from working amounts to considerable pressure to deter workers from combining their economic strength. This is particularly true if union membership or the payment of union dues is construed to amount to participation in, or financing of, the dispute." (Lesser, *supra,* at 175).

Third, the existence of experience rating systems has been seen as an argument *favoring* the elimination of labor-dispute disqualifications, because such a system may encourage employers to instigate a labor dispute where layoffs are contemplated, in order to avoid an increase of taxes:



> "Moreover, under systems in which the denial of benefits to large numbers of persons has an immediate effect on the rate of contributions which an employer is required to pay, it is questionable whether neutrality is effected by the denial of benefits. An employer, who knows that because of slackness of trade or for other reason he may be forced to close his business or lay off a certain class of workers may by the disqualification be encouraged to precipitate a dispute." (Lesser, *supra,* at 175; see also Fierst & Spector, *supra,* at 464; Schindler, *supra,* at 863, 881.)

Fourth, and finally, the commentary makes clear that the states have *not,* through the labor dispute disqualification provisions, avoided embroiling the state administrative agency in problems between unions and management. For, the state laws involve determinations on questions such as whether there was a strike or a lockout; whether there is indeed a "dispute", or a "labor dispute"; whether the discharges were in fact "due" to a labor dispute or occurred for some other reason; and whether there has been a "stoppage of work" due to such dispute. See Fierst & Spector, *supra,* at 469-489. Both elimination entirely of labor dispute disqualifications, and specifically pegging them to the merits of labor disputes, has been justified on this basis—that is, that a true laissez-faire policy under state unemployment

statutes is not a possibility. See Fierst & Spector, *supra;* Lesser, *supra.*

Thus, the question whether it is payment of benefits to some or all workers affected by labor disputes, or denial thereof, which represents government "neutrality" is at least strongly debatable. Moreover, even if one were to determine that some general principle could in fact be derived solely from the generalities of the national labor policy, to embody that policy in a workable standard for state statutes would entail judicial legislation of an extraordinary nature.

As the short discussion of labor dispute disqualification provisions included in the Appendix to this Brief illustrate, the variation among state laws on the labor dispute question is enormous.[36] If a principle of neutrality with regard to labor disputes were erected as a requirement of federal supremacy, it would be necessary for the courts to determine as a matter of law the myriad issues the state legislatures have resolved, and resolved variously, as a matter of policy. For example, courts would be constrained to determine whether the principle applied to lockouts as well as strikes; whether it required extending the disqualification beyond those actively supporting the strike and, if so, to whom; whether an exception must be created where the employer himself has acted contrary to the national labor policy—for example, by committing an unfair labor practice, by discrimi-

[36]Even the wide array of present statutes does not exhaust all the possibilities. In the past, there have been variants which do not now exist. See Schindler, *supra,* at 862, 876; Lesser, *supra,* at 170 n.10.



nating on the basis of race or sex, by breaching a collective bargaining agreement, or by disregarding occupational safety and health standards; whether the disqualification may cease once the claimant has obtained, and lost for reasons beyond his control, a second job and, if so, how long that second job must be held; whether the disqualification should cease once a settlement of the dispute has been reached, or only when work is once again available; and whether the disqualification must, or may, apply even if the striker is permanently replaced, or the employer subsequently stops operations entirely, or for some other reason the employment relationship is severed entirely.[37]

Each of these issues is addressed in the state laws and in the decisions construing them. Each may have some effect on the balance of economic power in labor

[37]For example, in *Kimbell, Inc. v. Employment Security Commission,* 429 U.S. 804, this Court dismissed for want of a substantial federal question a case in which a state court had held valid a state law paying benefits to strikers as long as the employer continued in substantial operation but not thereafter. If the decision of the Court of Appeals in this case is reversed, the question will have to be faced whether to extend that result to the *Kimbell* variant, which is much more prevalent than the time-limited disqualification imposed in New York. (See Appendix to this Brief). Cogent arguments could be made suggesting that the *Kimbell* version is "neutral" even if the New York one is not. For, the *Kimbell* version continues payments only as long as the employer is deriving income as well; one could view that principle as one of true "neutrality."

We are not suggesting, of course, that the Court make any such distinction. Rather, we believe that the *Kimbell* result was correct, and that it is fully applicable to this case. But, that is because *Kimbell* was presumably based on the fact that, as the Memorandum for the United States as Amicus Curiae in *Kimbell,* demonstrated, and we demonstrate above, Congress did not intend for the courts to make such distinctions. Rather, it intended to permit free reign to the states on the labor dispute problem.

disputes. For courts to resolve these matters with only the broad outlines of the national labor policy as a beacon would be to undertake precisely the delicate interest-balancing which Congress, in 1935 and subsequently, has declined to attempt in a nationally uniform manner.[38]

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## CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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**(Appendix Follows)**

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[38]This endeavor could also lend credence to similar arguments in cases entirely outside the area of social benefits. For example, if the principle of governmental economic neutrality during labor disputes were erected into a rule supervening all other considerations, one might conclude that the government could not enter into any contract with an employer at whose establishment there was a labor dispute, or that the government would be compelled to defer payment of all funds during the term of such a dispute under any such contract previously entered into.

# APPENDIX

## Appendix

**(Excerpt from U.S. Department of Labor, Comparison of State Unemployment Insurance Laws (1975) (Pages 4-10 to 4-12))**

**445 Labor Disputes**

Unlike the disqualifications for voluntary leaving, discharge for misconduct, and refusal of suitable work, the disqualifications for unemployment caused by a labor dispute do not involve a question of whether the unemployment is incurred through fault on the part of the individual worker. Instead, they mark out an area that is excluded from coverage. This exclusion rests in part on an effort to maintain a neutral position in regard to the dispute and, in part, to avoid potentially costly drains on the unemployment funds.

The principle of "neutrality" is reflected in the type of disqualification imposed in all of the State laws. The disqualification imposed is always a postponement of benefits and in no instance involves reduction or cancellation of benefit rights. Inherently, in almost all States, the period is indefinite and geared to the continuation of the dispute-induced stoppage or to the progress of the dispute.

*445.01 Definition of labor dispute.*—Except for Alabama and Minnesota, no State defines labor dispute. The laws use different terms; for example, labor dispute, trade dispute, strike, strike and lockout, or strike or other bona fide labor dispute. Some States exclude lockouts, presumably to avoid penalizing workers for the employers action; several States exclude disputes resulting from the employer's failure to

conform to the provisions of a labor contract; and a few States, those caused by the employer's failure to conform to any law of the United States or the State on such matters as wages, hours, working conditions, or collective bargaining, or disputes where the employees are protesting substandard working conditions (Table 405).

*445.02 Location of the dispute.*—Usually a worker is not disqualified unless the labor dispute is in the establishment in which the worker was last employed. Idaho omits this provision; North Carolina, Oregon, Texas, and Virginia include a dispute at any other premises which the employer operates if the dispute makes it impossible for the employer to conduct work normally in the establishment in which there is no labor dispute. Michigan includes a dispute at any establishment within the United States functionally integrated with the striking establishment or owned by the same employing unit. Ohio includes disputes at any factory, establishment, or other premises located in the United States and owned or operated by the employer.

*445.03 Period of disqualification.*—In most States the period of disqualification ends whenever the "stoppage of work because of a labor dispute" comes to an end or the stoppage ceases to be caused by the labor dispute. In other States, disqualifications last while the labor dispute is in "active progress," and in Arizona, Connecticut, Idaho, and Ohio, while the workers' unemployment is a result of a labor dispute (Table 405).



A few State laws allow individuals to terminate a disqualification by showing that the labor dispute (or the stoppage of work) is no longer the cause of their unemployment. The Missouri law specifies that bona fide employment of the claimant for at least the major part of each of 2 weeks will terminate the disqualification; the Michigan law provides that if a claimant works in at least 2 consecutive calendar weeks, and earns wages in each week of at least the weekly benefit amount based on employment with the employer involved in the labor dispute, the disqualification will terminate; and the New Hampshire law specifies that the disqualification will terminate 2 weeks after the dispute is ended even though the stoppage of work continues. In contrast, the Arkansas, Colorado, and North Carolina laws extend the disqualification for a reasonable period of time necessary for the establishment to resume normal operations; and Michigan and Virginia extend the period to shutdown and startup operations. Under the Maine, Massachusetts, New Hampshire, and Utah laws, a claimant may receive benefits if, during a stoppage of work resulting from a labor dispute, the claimant obtains employment with another employer and earns a specified amount of wages (Table 405). However, base-period wages earned with the employer involved in the dispute cannot be used for benefit payments while the stoppage of work continues.

Only two States provide for a definite period of disqualification. In New York a worker, unemployed because of a strike or lockout in the establishment

where such individual was employed, can accumulate effective days after 7 weeks and the waiting period, or earlier if the controversy is terminated earlier. In Rhode Island a worker unemployed because of a strike in the establishment in which such worker was employed is entitled to benefits for unemployment which continues after a 6-week disqualification period and a 1-week waiting period. In addition to the usual labor dispute provision, Michigan, in a few specified cases, disqualifies for 6 weeks in each of which the claimant must either earn remuneration in excess of $25 or meet the regular eligibility requirements, plus an equal reduction of benefits based on wages earned with the employer involved.

In Indiana termination of employment with the employer involved in the dispute is sufficient showing that the unemployment is not caused by the dispute.

*445.04 Exclusion of individual workers.*—Alabama, California, Delaware, Kentucky, New York, North Carolina and Wisconsin do not exempt from disqualification those workers who are not taking part in the labor dispute and who have nothing to gain by it. In Minnesota an individual is disqualified for 1 week if the individual is not participating in or directly interested in the labor dispute. In Texas the unemployment must be caused by the claimant's stoppage of work. Utah applies a disqualification only in case of a strike involving a claimant's grade, class, or group of workers if one of the workers in the grade, class, or group fomented or was a party to the strike; if the employer or employer's agent and any of the workers



or their agents conspired to foment the strike, no disqualification is applied. Massachusetts provides specifically that benefits will be paid to an otherwise eligible individual from the period of unemployment to the date a strike or lockout commenced, if such individual becomes involuntarily unemployed during negotiations of a collective-bargaining contract. Minnesota provides that an individual is not disqualified if he is dismissed during negotiations prior to a strike, if he is unemployed because of a jurisdictional dispute between two or more unions, or if unemployment is caused by an employer's willful failure to comply with either Federal and State occupational safety and health laws or safety and health provisions in a union agreement. Ohio provides that the labor dispute disqualification will not apply if the claimant is laid off for an indefinite period and not recalled to work prior to the dispute or was separated prior to the dispute for reasons other than the labor dispute, or if he obtains a bona fide job with another employer while the dispute is still in progress. Connecticut provides that an apprentice, unemployed because of a dispute between his employer and journeymen, shall not be held ineligible for benefits if he is available for work. Indiana excludes from disqualification individuals not recalled after the labor dispute has been terminated and sufficient time to resume normal activities has elapsed. The other States provide that individual workers are excluded if they and others of the same grade or class are not participating in the dispute, financing it, or directly interested in it, as indicated in Table 405.